

# ARIZONA ADOPTS THE REVISED UNIFORM ARBITRATION ACT

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After seven years of consideration,<sup>1</sup> the Arizona Legislature in 2010 adopted the revised version of the Uniform Arbitration Act promulgated in 2000 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), commonly known as the Revised Uniform Arbitration Act (RUAA).<sup>2</sup> As of this writing, fourteen other states, including the District of Columbia, have adopted the RUAA or substantial versions of it.<sup>3</sup>

The original Uniform Arbitration Act (UAA) was promulgated by NCCUSL in 1955 and adopted by the Arizona Legislature in 1962 (AZ-UAA).<sup>4</sup> NCCUSL appointed a Study Committee in 1994 to determine

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1. The Revised Uniform Arbitration Act was first introduced in the Arizona Legislature in 2002, H.B. 2491, 45th Leg., 2d Reg. Sess. (Ariz. 2002), and each year thereafter (except 2009) until adopted in 2010. H.B. 2430, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

2. UNIF. ARBITRATION ACT, 7 U.L.A. 1-98 (2009) [hereinafter RUAA].

3. ALASKA STAT. ANN. §§ 09.43.300-595 (West, Westlaw through 2010 2d Reg. Sess.); COLO. REV. STAT. ANN. §§ 13-22-201 to -230 (West, Westlaw through chs. 1-6 of the 2011 1st Reg. Sess.); D.C. CODE §§ 16-4401 to -4430 (Westlaw through Jan. 11, 2011); HAW. REV. STAT. ANN. §§ 658A-1 to -29 (West, Westlaw through 2010 Reg. & Spec. Sess.); NEV. REV. STAT. ANN. §§ 38.206-248 (West, Westlaw through 2009 Reg. Sess. & 2010 26th Spec. Sess.); N.J. STAT. ANN. §§ 2A:23B-1 to -30 (Westlaw through 2011 Legis. Sess.); N.M. STAT. ANN. §§ 44-7A-1 to -30 (West, Westlaw through 2010 Legis.); N.C. GEN. STAT. §§ 1-569.1 to -569.30 (West, Westlaw through 2010 Reg. Sess.); N.D. CENT. CODE §§ 32-29.3-01 to -29 (West, Westlaw through 2009 Reg. Sess.); OKLA. STAT. tit. 12 §§ 1851-1881 (Westlaw through 2010 2d Reg. Sess.); OR. REV. STAT. §§ 36.600-740 (West, Westlaw through 2010 Spec. Sess.); UTAH CODE ANN. §§ 78B-11-101 to -130 (West, Westlaw through 2010 Gen. Sess.); WASH. REV. CODE ANN. §§ 7.04A.010-900 (West, Westlaw through 2011 Legis.); 2010 Minn. Sess. Law Serv. 264 (West). See generally Matthew E. Braun, *The Revised Uniform Arbitration Act*, 18 OHIO ST. J. DISP. RESOL. 237 (2002); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1 (2001); Mark E. Lassiter, *Arizona's New Revised Uniform Arbitration Act*, ARIZ. ATT'Y, Nov. 2010, at 30. Timothy Heinsz, the former Dean of the University of Missouri School of Law, was the Reporter to the Drafting Committee of the RUAA.

4. H.B. 127, 25th Leg., 2d Reg. Sess. (Ariz. 1962).

whether the UAA should be revised. By 1996 the Study Committee concluded that changes were needed and a Drafting Committee was appointed that year, holding its first meeting in May 1997.<sup>5</sup> The decision to revise the UAA was based on “the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments” in arbitration law.<sup>6</sup>

The purpose of this article is to review the newly-adopted legislation and draw upon prior Arizona appellate decisions, as well as decisions in other states which have adopted the RUAA, to assist in understanding its provisions. Decisions from other jurisdictions and the Comments to each section of the RUAA by the Drafting Committee are important because the AZ-RUAA provides that in “applying and construing” the law, “consideration must be given to the need to promote uniformity of the law with respect to its subject matter among [the] states that enact it.”<sup>7</sup> Rather than replace the state’s existing arbitration statute, the legislature adopted AZ-RUAA but excluded certain categories of disputes from the AZ-RUAA, making those disputes subject to the AZ-UAA. These exceptions will be explained more fully later.

#### RELATIONSHIP OF STATE ARBITRATION LAWS TO THE FEDERAL ARBITRATION ACT

Before describing the changes to Arizona’s arbitration law made by the AZ-RUAA, it is important to understand the relationship between state arbitration laws such as the AZ-RUAA, and the Federal Arbitration Act (FAA). In enacting the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration.”<sup>8</sup> According to the Supreme Court, there are only two limitations on the enforceability of arbitration provisions governed by the FAA: “they must be part of a written maritime contract or a contract ‘evidencing a transaction involving commerce’ and such clauses may be

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5. Heinsz, *supra* note 3, at 2.

6. RUAA, Prefatory Note.

7. ARIZ. REV. STAT. ANN. § 12-3028 (Westlaw through 2011 Legis. Sess.). Therefore, it is appropriate to look to the decisions of other courts for “guidance.” States which have adopted the RUAA have found this language to mean that it is appropriate to consider the Comments to the RUAA in interpreting its provisions. *Prime Props., Inc. v. Leahy*, 228 P.3d 617, 620–21 (Or. Ct. App. 2010); *Townsend v. Quadrant Corp.*, 224 P.3d 818, 824 n.7 (Wash. Ct. App. 2009).

8. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Arizona courts have consistently held that the public policy of Arizona favors arbitration as a means of resolving disputes. *E.g.*, *Jeanes v. Arrow Ins. Co.*, 494 P.2d 1334, 1336 (Ariz. Ct. App. 1972).

revoked upon ‘grounds as exist at law or in equity for the revocation of any contract.’”<sup>9</sup>

The Supreme Court has interpreted the term “involving commerce” in the FAA as indicating the broadest permissible exercise of Congress’s Commerce Clause power.<sup>10</sup> The Supreme Court also has clarified that Congress’s Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.<sup>11</sup> Thus, the FAA’s reach is quite broad.

Where an agreement falls within the coverage of the FAA, there is a strong presumption that the FAA, not state law, provides the rules for the arbitration.<sup>12</sup> Importantly, however, even if an arbitration agreement falls under the FAA, parties are free to conduct their arbitration under state arbitration laws such as the AZ-RUAA<sup>13</sup> so long as they manifest a “clear intent” to do so.<sup>14</sup> A general choice of law provision in a contract is not sufficient to remove a case from the FAA’s default provisions.<sup>15</sup> However, where parties agree to conduct their arbitration according to the arbitration law of a particular state, this constitutes sufficient manifestation of their intent so that the arbitration laws of that state will apply to their arbitration.<sup>16</sup>

By incorporating state arbitration laws, such as the AZ-RUAA, into an arbitration agreement, parties can utilize a complete set of procedural rules missing from the FAA, adopted almost ninety years ago. The AZ-RUAA provides a comprehensive set of procedural rules that answer many questions left open by the FAA. Thus, the RUAA “provides state legislatures with a more up-to-date statute to resolve disputes through arbitration.”<sup>17</sup>

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9. *Southland*, 465 U.S. at 11; *see* 9 U.S.C. § 2 (Westlaw through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, 111-350, 111-377, and 111-383)).

10. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995).

11. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003).

12. *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002).

13. *See Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

14. *Fid. Fed. Bank v. Durga Ma Corp.*, 386 F.3d 1306, 1311 (9th Cir. 2004) (citation omitted).

15. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

16. *See Johnson v. Gruma Corp.*, 614 F.3d 1062, 1066–67 (9th Cir. 2010).

17. RUAA, Prefatory Note. As an alternative to, or in addition to, adopting a state’s arbitration law, where an arbitration is governed by the FAA, parties may choose, and customarily do choose, to incorporate into their agreement the procedural rules of an arbitration organization such as the American Arbitration Association. However, the FAA’s procedural provisions do not apply in state court proceedings. *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597 (Cal. 2008).

## KEY DEFINITIONS

The AZ-RUAA contains a number of definitions that make significant changes in arbitration practice.<sup>18</sup> First, an arbitration agreement must be contained in a “record” which is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium . . . that is retrievable in perceivable form.”<sup>19</sup> Unlike the AZ-UAA which requires an arbitration agreement to be in writing,<sup>20</sup> the AZ-RUAA defines record not only to mean a written document but also an electronic document.<sup>21</sup> Similarly, the arbitration award, which must be in a record, may also be in electronic format, although a “copy” of the award must be provided to each party to the arbitration proceeding.<sup>22</sup> The definition of record should be read in conjunction with a later provision of the AZ-RUAA which provides that the law is intended to conform to the Electronic Signatures in Global and National Commerce Act (Electronic Signatures Act).<sup>23</sup>

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18. Other than defining the term “court” as the “superior courts of the state of Arizona,” ARIZ. REV. STAT. ANN. § 12-1516 (Westlaw through 2011 Legis. Sess.), the AZ-UAA contains no definitional section. Other definitions in the AZ-RUAA include the following. An “arbitration organization” is defined as an “association, agency, board, commission or other entity that is neutral and that initiates, sponsors or administers an arbitration proceeding or is involved in the appointment of an arbitrator.” *Id.* § 12-3001(1). An “arbitrator” is an “individual who is appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.” *Id.* § 12-3001(2). A “court” is a “court of competent jurisdiction in this state.” *Id.* § 12-3001(3). “Person” under the AZ-RUAA is defined as an “individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality or public corporation or any other legal or commercial entity.” *Id.* § 12-3001(5).

19. *Id.* § 12-3001(6). The purpose of this definition is to “accommodate the use of electronic evidence in business and governmental transactions.” RUAA § 1 cmt. 5. This definition is found in a number of other Arizona statutes. *E.g.*, ARIZ. REV. STAT. ANN. § 12-2238(G)(2) (mediation privilege statute); *id.* § 14-10005(C)(1) (Uniform Disclaimer of Property Interests Act); *id.* § 47-1201(B)(31) (Uniform Commercial Code); *id.* § 47-5102(A)(14) (Uniform Commercial Code).

20. ARIZ. REV. STAT. ANN. § 12-1501.

21. “In this time of e-commerce, businesses and consumers will conduct more and more transactions by electronic means, and this changed technology will transform the manner in which parties arbitrate disputes . . . . The RUAA takes account of this shift in business operations in a number of ways and seeks to accommodate even electronic arbitration (e-arbitration).” Heinsz, *supra* note 3, at 9.

22. ARIZ. REV. STAT. ANN. § 12-3019(A).

23. 15 U.S.C. §§ 7001, 7002 (Westlaw through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, 111-350, 111-377, and 111-383)). This act provides that in transactions affecting interstate or foreign commerce, a “contract or other record relating to the transaction shall not be denied legal effect merely because it is in electronic form.” *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295 (7th Cir. 2002).

The definition of “knowledge”<sup>24</sup>—actual knowledge—should be read together with the meaning of “notice.”<sup>25</sup> The concept of notice applies throughout the AZ-RUAA. For example, an arbitration is initiated by giving “notice in a record” to the other parties to the arbitration agreement.<sup>26</sup> Upon making an award, an arbitrator must give notice of the award to each party.<sup>27</sup>

Except where otherwise specified in the AZ-RUAA,<sup>28</sup> notice is given to another “by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.”<sup>29</sup> For example, mailing notice to the last known address of a party has been held to be sufficient notice by an arbitrator of the date and time of a hearing.<sup>30</sup> A person is considered to have notice if the person has actual knowledge of the notice,<sup>31</sup> or if the person has received notice.<sup>32</sup> A person is considered to receive notice when it “comes to the person’s attention or the notice is delivered at the person’s place of residence or place of business or at another location held out by the person as a place of delivery of such communications.”<sup>33</sup>

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24. ARIZ. REV. STAT. ANN. § 12-3001(4). Actual knowledge “is not intended to include imputed knowledge or constructive knowledge.” RUAA § 1 cmt. 4.

25. ARIZ. REV. STAT. ANN. § 12-3002.

26. *Id.* § 12-3009(A).

27. *Id.* § 12-3019.

28. The manner of notice with respect to the initiation of an arbitration is specific, and takes precedence over the notice provisions in this section. *See infra* note 83 and accompanying text.

29. ARIZ. REV. STAT. ANN. § 12-3002(A). The definition of notice “spells out standards for when notice is given and received rather than requiring any particular means of notice. This allows parties to use systems of notice that become technologically feasible and acceptable, such as fax or electronic mail.” RUAA § 2 cmt. 1.

30. *Linsenmayer v. Omni Homes, Inc.*, 668 S.E.2d 388, 391–92 (N.C. Ct. App. 2008). In that case the defendants did not appear at the arbitration hearing and an award was entered ordering the defendants to pay over \$300,000 in damages and attorneys’ fees. The arbitrator sent the hearing notice to the address on file of the defendants’ representative. The defendants changed their address but did not inform the arbitrator. The court held it was sufficient to send the notice to the representative’s place of business. The court observed that the arbitrator also sent notice to the defendants’ attorney as well as to the attorney who took over representation of the defendants. Citing the comparable provisions of North Carolina’s arbitration law, the court held that “[a]ctual receipt is not required by the statute.” *Id.*

31. ARIZ. REV. STAT. ANN. § 12-3001(4).

32. *Id.* § 12-3002(B).

33. *Id.* § 12-3002(C).

## APPLICABILITY OF THE AZ-RUAA AND EXCLUSIONS

The AZ-RUAA is applicable to any agreement to arbitrate made after January 1, 2011, or before, if all parties agree.<sup>34</sup> On or after January 1, 2011, the AZ-RUAA “governs an agreement to arbitrate whenever made.”<sup>35</sup> If an arbitration agreement is made before January 1, 2011, however, the AZ-UAA will apply if “an action or proceeding is commenced” before January 1, 2011; the AZ-RUAA will apply if the arbitration or proceeding is commenced after January 1, 2011.<sup>36</sup>

The AZ-RUAA does not entirely replace Arizona’s existing arbitration law—the AZ-UAA. Four categories of disputes are excluded from the AZ-RUAA, three of which remain included within the AZ-UAA. In other words, Arizona now has two arbitration statutes. Like the AZ-UAA, disputes between an employer and employee or their respective representatives, are excluded from the AZ-RUAA.<sup>37</sup> Three categories of

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34. *Id.* § 12-3003(A)(1)–(2). In *Snider v. Prod. Chem. Mfr., Inc.*, 230 P.3d 1, 4 (Or. 2010), the court held that Oregon’s adoption of the RUAA applied to the dispute rather than Oregon’s former arbitration law because no proceeding was commenced and no right accrued before January 1, 2004, the date set forth in the comparable provision of Oregon’s arbitration statute. Although prior to January 1, 2011, parties were free to follow the AZ-RUAA, there is uncertainty regarding the enforceability of any such agreement because section 6 of H.B. 2430 provides that the law was not effective until December 31, 2010.

35. ARIZ. REV. STAT. ANN. § 12-3003(A)(3). By adopting this provision, the “legislature will express a specific intent that the RUAA, on the date which the legislature selects, will have retroactive application as to arbitration agreements entered into prior to the effective date of the legislation.” RUAA § 2 cmt. 5. In Arizona, for a statute to have retroactive effect, the legislature must expressly declare its intent that a statute apply retroactively. ARIZ. REV. STAT. ANN. § 1-244 (“No statute is retroactive unless expressly declared therein.”); *Cheney v. Superior Court*, 698 P.2d 691, 694 n.3 (Ariz. 1985).

36. H.B. 2430 § 5, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Section 5 of H.B. 2430 provides that the AZ-RUAA “does not affect an action or proceeding commenced or a right accrued before January 1, 2011.” The Hawaii Supreme Court, considering a similar provision under Hawaii’s version of the RUAA, held that because the legislature “would not have intended the absurd result of having parties to an arbitration be subjected to a change of rules while in the midst of an ongoing arbitration proceeding,” this provision applies where “arbitration proceedings” are commenced after the operative date in the statute. *United Pub. Workers, AFSCME Local 646 v. Dawson Int’l, Inc.*, 149 P.3d 495, 512 (Haw. 2006); *see Rock Work, Inc. v. Pulaski Constr. Co.*, 933 A.2d 988, 988 (N.J. Super. Ct. App. Div. 2007). The District of Columbia interpreted that jurisdiction’s statute in a way that distinguished between the proceeding in the trial court and the proceeding on appeal. In *Menna v. Plymouth Rock Assurance Corp.*, 987 A.2d 458 (D.C. 2010), a motion to compel arbitration was filed in 2007, the year before the District of Columbia’s adoption of the RUAA. The appellate court considered the appeal in 2010. Because the District of Columbia statute provided that after July 1, 2009, the RUAA would govern arbitration agreements whenever made, the court held that the RUAA would apply to the appeal.

37. ARIZ. REV. STAT. ANN. § 12-3003(B)(1). The AZ-UAA also contains an exclusion for “arbitration agreements between employers and employees or their respective representatives.”

disputes remain subject to arbitration under the AZ-UAA: disputes arising from a contract of insurance, disputes between a national banking association or federal savings association (or its affiliate, subsidiary or holding company) and a customer, and disputes involving a self-regulatory organization defined in the Securities Exchange Act of 1943, the Commodity Exchange Act or regulations adopted under these acts.<sup>38</sup>

#### NONWAIVABLE PROVISIONS

Although arbitration is a matter of contract, the AZ-RUAA provides that certain aspects of the arbitral process cannot be changed regardless of the parties' agreement. Certain provisions of the AZ-RUAA can only be changed after a dispute has arisen, others cannot be changed at any time. Except those provisions of the AZ-RUAA specifically enumerated in section 12-3004(B) and (C), the parties to an arbitration agreement "may vary the effect of"<sup>39</sup> the requirements of the AZ-RUAA "to the extent permitted by law."<sup>40</sup>

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*Id.* § 12-1517. This provision has been held to exempt employment arbitration agreements from the AZ-UAA. *N. Valley Emergency Specialists, LLC v. Santana*, 93 P.3d 501, 502 (Ariz. 2004). Importantly, however, the exclusion in the AZ-RUAA and the AZ-UAA for agreements to arbitrate employment disputes is preempted by the FAA to the extent the agreement involves commerce—an agreement that would fall within the scope of Congress's Commerce Clause power. Under the FAA, with the narrow exception of workers engaged in interstate transportation, all other arbitration agreements between employers and employees in contracts evidencing transactions involving commerce are enforceable. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 105 (2001) (employment disputes are subject to arbitration where subject to the FAA). Because the scope of the FAA is coextensive with Congress's Commerce Clause power, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), virtually all employment relationships, to the extent they are subject to congressional legislative power, are covered by the FAA. Because the FAA prohibits the states from making special rules which interfere with the ability of parties to agree to arbitrate their disputes, the exclusion of employment disputes in the AZ-UAA and the AZ-RUAA will be preempted so long as the agreement to arbitrate the dispute falls within the scope of the FAA. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). *See generally* Bruce E. Meyerson, *Arbitration*, in 1 ARIZONA EMPLOYMENT LAW HANDBOOK, art. 1.8 (2010 ed.).

38. ARIZ. REV. STAT. ANN. § 12-3003(B)(2)–(4). The AZ-RUAA is now the exclusive procedure for asserting claims against the State of Arizona or any state agency relating to any procurement under the Arizona Procurement Code. *Id.* § 41-2615.

39. Although the parties' arbitration agreement must be in a "record," except for provisions of the AZ-RUAA that may not be changed, parties "subsequently may vary [the arbitration] agreement orally, for instance, during the arbitration proceeding." RUAA § 4 cmt. 2.

40. ARIZ. REV. STAT. ANN. § 12-3004(A). The language "to the extent permitted by law" was included by the Drafting Committee "to incorporate . . . theories of adhesion and unconscionability into the arbitration process under the RUAA." Heinsz, *supra* note 3, at 25–26. The purpose of this limitation is "to inform the parties that they cannot vary the terms of an

The provisions set forth in section 12-3004(B) may be changed by the parties to an arbitration agreement, but not before a dispute arises.<sup>41</sup> These are:

- the procedures for applying for judicial relief under section 12-3005;<sup>42</sup>
- the definition of which disputes are subject to arbitration under section 12-3006(A);<sup>43</sup>
- the provisions regarding interim remedies under section 12-3008;
- the provisions regarding subpoenas and discovery under section 12-3017(A)–(B);
- the provision regarding court jurisdiction to enforce an arbitration award under section 12-3026;
- the prohibition against unreasonable restrictions under section 12-3009 regarding notice of the initiation of an arbitration proceeding;
- the prohibition against unreasonable restrictions under section 12-3012 regarding the disclosure of facts by a neutral arbitrator;<sup>44</sup> and

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arbitration agreement from the RUAA if the result would violate applicable law.” RUAA § 4 cmt. 3. Arizona federal and state courts have applied the doctrine of unconscionability to arbitration agreements. *E.g.*, *Batory v. Sears, Roebuck & Co.*, 456 F.Supp.2d 1137 (D. Ariz. 2006); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992). Arbitration organizations such as the American Arbitration Association (AAA) offer to parties comprehensive rules to govern their arbitration. These rules are typically incorporated into a predispute arbitration agreement. Unless aspects of such rules fall within the subject matter for which waiver is prohibited, the rules of the arbitration organization will govern the parties’ arbitration, even where inconsistent with provisions of the AZ-RUAA.

41. Parties are able to vary these procedures after a dispute arises because after “a dispute . . . arises, the parties should have more autonomy to agree to provisions different than those required under the RUAA.” RUAA § 4 cmt. 4.

42. In 2011, the Arizona Legislature approved a change to section 12-3004(B) by limiting the prohibition on predispute changes to section 12-3005(A) only. S.B. 1504, 50th Leg., 1st Reg. Sess. (Ariz. 2011). The result of this change is to permit parties to agree in a predispute arbitration agreement on the manner of providing notice when an initial motion is filed in court. *See infra* note 49 and accompanying text.

43. S.B. 1504 made a further significant change to section 12-3004(B), limiting the prohibition on predispute changes to section 12-3006(A) only. S.B. 1504 makes section 12-3006(B) subject to waiver before a dispute arises thereby allowing parties in a predispute arbitration agreement to agree that arbitrators may determine issues of arbitrability. *See infra* notes 54–58 and accompanying text.

44. There is no restriction on the ability of the parties to change the requirements regarding disclosure by a non-neutral arbitrator. RUAA § 4 cmt. 4(b).

- waiver of the right under section 12-3016 to be represented by counsel.

Section 12-3004(C) sets forth those provisions that are not waivable either before or after a dispute arises:

- provisions regarding the applicability of the AZ-RUAA under section 12-3003(A)(1), (3);
- the provisions regarding motions to compel and motions to stay arbitration under section 12-3007;
- provisions regarding arbitral immunity under section 12-3014;
- provisions regarding judicial enforcement of preaward rulings under section 12-3018;
- provisions regarding the modification or correction of an award by the court under section 12-3020(D)–(E);
- the provision regarding the confirmation of an award under section 12-3022;
- the provisions regarding judicial review of arbitration awards under section 12-3023;
- provisions regarding judicial modification or correction of an award under section 12-3024;
- provisions regarding the entry of judgment following the vacatur of an award and court authorization of reasonable costs with respect to a motion to vacate under section 12-3025(A)–(B);
- the provision regarding the directive by the legislature to apply and construe the AZ-RUAA with the objective of promoting “uniformity of the law with respect to its subject matter among states that enact it” under section 12-3028;
- the provision in section 12-3029 stating that references in the AZ-RUAA to electronic records and electronic signatures are in compliance with the Electronic Signatures Act; and
- the provision making the AZ-RUAA the exclusive process for resolving disputes under the State of Arizona’s procurement law.<sup>45</sup>

There appears to be an error in section 12-3004 because there is a reference to appeal procedures in both subsection (B) and subsection (C). Subsection

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45. ARIZ. REV. STAT. ANN. § 41-2615.

(B) provides that after a dispute arises, parties should have the power to negotiate different rules regarding the appeal from arbitration orders. But subsection (C) provides that the provisions regarding appeals may not be waived at all. The Comments to the RUAA indicate that after a dispute arises, but not before, parties should be free to limit a court's jurisdictional provisions or the provisions regarding appeals. Presumably, a court would resolve the conflict in the AZ-RUAA consistent with the Comments to the RUAA.<sup>46</sup>

#### APPLICATIONS FOR JUDICIAL RELIEF

Applications for judicial relief are made by motions to the court, to be heard “in the manner provided by law or court rule for making and hearing motions.”<sup>47</sup> However, if a civil action involving the agreement to arbitrate is not pending, notice of an initial motion must be served “in the manner provided by law for the service of a summons in a civil action.”<sup>48</sup> Otherwise, notice of the motion must be given in the manner provided “by law or court rule for serving motions in pending cases.”<sup>49</sup>

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46. After a dispute arises, parties may choose “to limit the jurisdictional provisions” of a reviewing court . . . or the provisions regarding appeals . . . to decide that there will be no appeal from lower court rulings.” RUAA § 4 cmt. 4(d). Other than in an adhesion contract, parties should be able to agree that an arbitration award is final and nonappealable, or that the superior court's review of an an arbitration award is final and nonappealable. The suggestion in the Comments that parties can limit a court's jurisdiction would appear contrary to Arizona law. *Cf. Rodieck v. Rodieck*, 450 P.2d 725, 732 (Ariz. Ct. App. 1969) (“Parties are not allowed to confer jurisdiction over subject matter upon the courts of this state.”). *But see infra* note 183.

47. ARIZ. REV. STAT. ANN. § 12-3005(A). This provision is identical to existing law. *Id.* § 12-1515. The rules applicable to motions in the superior court of Arizona appear in Rule 7.1 of the Arizona Rules of Civil Procedure.

48. The rules applicable to the service of a summons appear in Rule 4 of the Arizona Rules of Civil Procedure.

49. ARIZ. REV. STAT. ANN. § 12-3005(B). Although not apparent from the actual language of this section, the Comments to the RUAA indicate that the intent of this section is to permit the parties to an arbitration agreement to agree to another method of providing initial notice of a motion filed in court. RUAA § 5 cmt. 1. By making subsection (B) subject to change in a predispute arbitration agreement, S.B. 1504 has made the AZ-RUAA consistent with the RUAA. S.B. 1504, 50th Leg., 1st Reg. Sess. (Ariz. 2011). The AZ-UAA provides that “[u]nless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.” ARIZ. REV. STAT. ANN. § 12-1515.

## ARBITRABILITY OF DISPUTES

The AZ-RUAA's definition of disputes subject to arbitration is substantially similar to existing law, with one important difference:

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.<sup>50</sup>

The AZ-UAA requires a “written agreement” to arbitrate.<sup>51</sup> The use of the word “record” in the AZ-RUAA means that an agreement to arbitrate may be in a written agreement or in any “electronic or other medium . . . that is retrievable in perceivable form.”<sup>52</sup>

This same section of the AZ-RUAA also addresses another aspect of arbitrability—who decides whether a dispute is arbitrable. The AZ-RUAA adopts the general rule that a “court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”<sup>53</sup>

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50. ARIZ. REV. STAT. ANN. § 12-3006(A). This section “is intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements.” RUAA § 6 cmt. 1. Arizona courts follow federal arbitration law in holding that arbitration clauses are to be “construed liberally and any doubts as to whether or not the matter in question is subject to arbitration should be resolved in favor of arbitration.” *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass’n, Inc.*, 467 P.2d 88, 91 (Ariz. Ct. App. 1970). Parties are permitted to modify a written arbitration agreement by way of a subsequent oral agreement. *Eng v. Stein*, 599 P.2d 796, 799–800 (Ariz. 1979) (the parol evidence rule does not prevent parties from modifying the original written agreement); RUAA § 6 cmt. 1 (“The language in [this section] as to the validity of arbitration agreements is the same as [the] UAA . . . and almost the same as the language of [the] FAA . . .”).

51. ARIZ. REV. STAT. ANN. § 12-1501.

52. *Id.* § 12-3001(6).

53. *Id.* § 12-3006(B). Citing the comparable provision in the Washington statute, the court held that the “trial court, not an arbitrator, generally determines the arbitrability of a dispute.” *Davis v. Gen. Dynamics Land Sys.*, 217 P.3d 1191, 1193 (Wash. Ct. App. 2009). Another Washington appellate court summed up the relationship between the provisions in this section this way:

[I]f a party makes a discrete challenge to the enforceability of the arbitration clause, a court must determine the validity of the clause. If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration. If the court finds as a matter of law that the arbitration clause is not enforceable, all issues remain with the court for resolution, not with an arbitrator. Alternatively, if a party challenges only the validity of the contract as a whole, the arbitrator has the authority . . . to determine the validity of the contract.

With the adoption by the Arizona Legislature of S.B. 1504 this provision is now waivable before a dispute arises.<sup>54</sup> This is an important change because it makes the AZ-RUAA comparable to the RUAA, which allows this provision to be subject to waiver in a predispute arbitration agreement.<sup>55</sup>

Under the FAA, parties can agree that an arbitrator, instead of a court, may decide if a dispute is arbitrable where they “clear[ly] and unmistakabl[y] [agreed to do] so.”<sup>56</sup> One of the most common arbitration rules, the Commercial Arbitration Rules (the Commercial Rules) of the American Arbitration Association (AAA), includes a provision allowing an arbitrator to “rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”<sup>57</sup> This language has been held sufficient to clearly and unmistakably grant to an arbitrator the power to determine the arbitrability of a dispute.<sup>58</sup> Because this provision can now be waived under the AZ-RUAA in a predispute arbitration agreement, the AZ-RUAA and the AAA Commercial Rules are consistent with respect to this issue. Therefore, by adopting the AZ-RUAA and incorporating the AAA Commercial Rules in an arbitration agreement, parties have agreed that arbitrability issues will be decided by the arbitrator.

The AZ-RUAA also provides that “an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”<sup>59</sup> The authority granted to arbitrators to determine conditions precedent to arbitration is consistent with the general rule that arbitrators are empowered to determine

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Townsend v. Quadrant Corp., 224 P.3d 818, 825 (Wash. Ct. App. 2009) (citations omitted). Neither of the Washington decisions discussed the situation where the parties agree that the arbitrator is permitted to decide issues of arbitrability.

54. ARIZ. REV. STAT. ANN. § 12-3004(B)(1); S.B. 1504, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

55. RUAA § 4(a); *see* Heinsz, *supra* note 3, at 40.

56. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 939 (1995). Under the AZ-UAA the “court may have to abstain from deciding the issue of arbitrability . . . if the arbitration agreement allows the arbitrator to decide arbitrability.” Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081, 1085 n.1 (Ariz. Ct. App. 2003).

57. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R-7 (2009) [hereinafter AAA COMMERCIAL RULES].

58. Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006). By incorporating the AAA Commercial Rules into their arbitration agreement the parties “clearly and unmistakably agreed that the arbitrator would primarily decide the arbitrability of the issues.” *Brake Masters Sys.*, 78 P.3d at 1088.

59. ARIZ. REV. STAT. ANN. § 12-3006(C). S.B. 1504 makes this provision subject to waiver in a predispute arbitration agreement. In light of the well-established law under the FAA which has been followed in Arizona, it would seem very unlikely that parties would choose to vary this power given to arbitrators. *See infra* note 60.

procedural issues that arise out of the parties' dispute.<sup>60</sup> The power granted to arbitrators to determine the enforceability of a contract containing an arbitration provision is derived from the so-called "separability doctrine" which views the arbitration clause as a separate agreement within a contract.<sup>61</sup> Finally, if a party to a court proceeding challenges the existence of an arbitration agreement or contends that a dispute does not fall within the scope of an arbitration agreement, the arbitration may proceed pending a ruling by the court to stay the arbitration.<sup>62</sup>

#### MOTIONS TO COMPEL OR STAY ARBITRATION

The AZ-RUAA section on motions to compel or stay arbitration, although similar to the AZ-UAA,<sup>63</sup> adds more detail. In a motion to compel arbitration, the court shall order the parties to arbitrate if the "refusing party does not appear or does not oppose the motion."<sup>64</sup> If the refusing party

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60. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002) (procedural questions which grow out of a dispute and bear upon its final disposition are presumptively not for a judge but for an arbitrator to decide). Citing the Comment to the applicable section of the RUAA, an Oregon court held that issues of estoppel and waiver are conditions precedent and therefore issues to be resolved by an arbitrator. *Livingston v. Metro. Pediatrics, LLC*, 227 P.3d 796, 802 (Or. Ct. App. 2010). Another example of a condition precedent to arbitration is whether a demand for arbitration is timely. *City of Cottonwood v. James L. Fann Contracting, Inc.*, 877 P.2d 284, 291 (Ariz. Ct. App. 1994). Conditions precedent to arbitrability embrace "procedural defenses . . . that do not go to the validity" of the arbitration agreement such as "waiver, the statute of limitations and laches." *Menna v. Plymouth Rock Assurance Corp.*, 987 A.2d 458, 465 (D.C. 2010). On the other hand, where it is contended that a party has waived the right to arbitrate by litigating a case in court, judges determine waiver under those circumstances. *Bolo Corp. v. Homes & Son Constr. Co.*, 464 P.2d 788, 790-91 (Ariz. 1970).

61. Arbitration agreements are considered an agreement independent and separate from the principal contract. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409 (1967). This so-called separability doctrine is followed in Arizona. *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 705 P.2d 490, 493 (Ariz. Ct. App. 1985). Arizona follows the federal rule that the enforceability of contracts containing an arbitration clause is determined by an arbitrator. *Id.*; see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

62. ARIZ. REV. STAT. ANN. § 12-3006(D). This section "follows the practice of the American Arbitration Association and most other arbitration organizations that if a party challenges the arbitrability of a dispute in a court proceeding, the arbitration organization or arbitrators in their discretion may continue with the arbitration unless a court issues an order to stay the arbitration or makes a final determination that the matter is not arbitrable." RUAA § 6(d) cmt. 6.

63. ARIZ. REV. STAT. ANN. § 12-1502. Arizona has rejected the so-called "intertwining doctrine" which permits a court to stay an arbitration while related nonarbitrable claims are litigated. *Hallmark Indus., LLC v. First Systech Int'l, Inc.*, 52 P.3d 812, 812-13 (Ariz. Ct. App. 2002).

64. ARIZ. REV. STAT. ANN. § 12-3007(A)(1). Citing the comparable provision in the Hawaii arbitration statute, the Hawaii Supreme Court held that a motion to compel arbitration

opposes the motion, the court “shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.”<sup>65</sup> When a motion is made to compel arbitration, the court must stay the pending judicial proceeding, if any, until a ruling is made on the motion.<sup>66</sup> If the claim subject to arbitration is severable from the remaining claims in the litigation, the stay may be limited to that claim.<sup>67</sup>

If a party moves in court alleging that an arbitration has been “initiated or threatened” but there is no arbitration agreement, the court shall “summarily” decide whether or not to order the parties to arbitrate.<sup>68</sup> The term “summarily” means a “trial court should act expeditiously and without a jury trial to determine whether a valid arbitration agreement exists.”<sup>69</sup>

A motion to compel or stay arbitration must be made in the court where a claim involving a dispute referable to arbitration is pending, or in any court pursuant to the venue provisions of the AZ-RUAA.<sup>70</sup> Of course, it goes without saying that a court “may not refuse to order arbitration because the claim . . . lacks merit or grounds for the claim have not been established.”<sup>71</sup>

#### INTERIM REMEDIES

The AZ-RUAA includes an important new section, not found in the AZ-UAA,<sup>72</sup> clarifying an arbitrator’s power to grant interim remedies, and

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cannot be filed until a party has first attempted to initiate an arbitration. *Ueoka v. Szymanski*, 114 P.3d 892, 901 (Haw. 2005).

65. ARIZ. REV. STAT. ANN. § 12-3007(A)(2). The word “summarily” in the comparable provision of the Oregon statute was held to mean “expeditiously and without a jury.” *Greene v. Salomon Smith Barney, Inc.*, 209 P.3d 333, 336 (Or. Ct. App. 2009); *see also* *J.A. Walker Co. v. Cambria Corp.*, 159 P.3d 126, 130 (Colo. 2007) (if material facts are undisputed, the trial court should resolve the dispute on the record before it; if material facts are in dispute, the court should “proceed expeditiously” to hold a hearing).

66. ARIZ. REV. STAT. ANN. § 12-3007(F).

67. *Id.* § 12-3007(G).

68. *Id.* § 12-3007(B)–(C).

69. RUAA § 7 cmt.

70. ARIZ. REV. STAT. ANN. § 12-3007(E). The venue provisions of the law are found in section 12-3027.

71. *Id.* § 12-3007(D).

72. Even though the AZ-UAA does not contain a provision pertaining to interim relief, the AAA Commercial Rules permit an arbitrator to “take whatever . . . measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.” AAA COMMERCIAL RULES, R-34(a). This rule, when incorporated by parties into their arbitration agreement, has been held sufficient to permit an arbitrator to grant interim remedies. *See* *CSA-Credit Solutions of Am., Inc. v. Schafer*, 408 F. Supp. 2d 503, 511–12 (W.D. Mich. 2006).

providing for the power of a court to grant interim remedies before an arbitration is initiated and even after an arbitration has begun.<sup>73</sup> The AZ-RUAA is different than the RUAA which uses the term “provisional remedies.”<sup>74</sup> An interim remedy would, however, include provisional relief, as well as temporary and preliminary injunctive relief.<sup>75</sup> Thus, the meaning of the interim remedy provision of the AZ-RUAA should be the same as the provisional remedy section of the RUAA.

The AZ-RUAA makes clear that an arbitrator has broad power to grant interim relief:

The arbitrator may issue such orders for interim remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action.<sup>76</sup>

This section is intended to give arbitrators very broad authority. As the Comments to the RUAA point out, the

case law, commentators, rules of arbitration organizations, and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief . . . . This authority has included the issuance of measures equivalent to civil remedies of attachment, replevin, and sequestration to preserve assets or to make preliminary rulings ordering parties to undertake certain acts that affect the subject matter of the arbitration proceeding.<sup>77</sup>

Under the AZ-RUAA, an interim ruling or order by an arbitrator prior to the issuance of a final award may be incorporated into an award and confirmed by the court.<sup>78</sup> A party may move the court for an expedited order confirming the award, in which case the court “shall summarily decide the motion.” The court must confirm the award unless the court vacates, modifies or corrects the award under the applicable provisions of the AZ-RUAA.

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73. ARIZ. REV. STAT. ANN. § 12-3008.

74. RUAA § 8. A provisional remedy in Arizona includes the “remedies of attachment, garnishment or replevin, but shall not include garnishment of wages.” ARIZ. REV. STAT. ANN. § 12-2401(3).

75. *Andrew Brown Co. v. Painters Warehouse, Inc.*, 466 P.2d 790 (Ariz. Ct. App. 1970) (provisional remedy of replevin referred to as an interim remedy).

76. ARIZ. REV. STAT. ANN. § 12-3008(B)(1).

77. RUAA § 8 cmt. 4.

78. ARIZ. REV. STAT. ANN. § 12-3018.

Addressing the issue of whether seeking interim relief from a court constitutes a waiver of arbitration, the AZ-RUAA provides that before an arbitrator is appointed, upon a showing of “good cause,” a court may enter an order for an interim remedy “to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.”<sup>79</sup> Even after an arbitrator is appointed, a party may still seek an interim remedy in court but “only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.”<sup>80</sup> The AZ-RUAA is clear that by seeking interim relief from a court, a party does not waive the right of arbitration.<sup>81</sup>

#### INITIATION OF ARBITRATION

A party initiates an arbitration by giving “notice” to the other parties to the agreement in a “record” in accordance with the parties’ agreement, or in the absence of an agreement “by certified mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action.”<sup>82</sup> The notice must describe the “nature of the controversy and the

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79. *Id.* § 12-3008(A). According to the Comments to the RUAA, *see* RUAA § 8 cmt. 3, this provision is derived from cases such as *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993), where the court upheld the decision of the district court granting a temporary restraining order prior to the initiation of the arbitration because it “served to maintain the status quo without prejudice to the merits of any of the parties’ claims or defenses until an arbitration panel could consider the issues presented.” Although not explicit in the statute, the Comments to the RUAA provide that after “a court makes a ruling [under this section] an arbitrator is allowed to review the ruling in appropriate circumstances.” RUAA § 8 cmt. 6.

80. ARIZ. REV. STAT. ANN. § 12-3008(B)(2). The Comments to the RUAA suggest that the court’s role under these circumstances should be “limited.” RUAA § 8 cmt. 3.

81. ARIZ. REV. STAT. ANN. § 12-3008(C). In *Bolo Corp. v. Homes & Son Constr. Co.*, 464 P.2d 788, 788–93 (Ariz. 1970), Homes began the dispute by commencing garnishment proceedings and by filing a complaint seeking money damages. The court held that by filing a complaint seeking money damages, the same relief Homes was entitled to under its arbitration agreement, Homes had waived the right to arbitrate. In a later decision, the court of appeals explained that *Bolo Corp.* does not stand for the proposition that seeking provisional relief alone constitutes a waiver of the right to arbitrate. *See Bancamerica Commercial Corp. v. Brown*, 806 P.2d 897, 900 (Ariz. Ct. App. 1990) (arbitration clause did not preclude recourse to the judicial remedy of attachment). Moreover, in subsequent decisions, Arizona courts have held that the mere filing of a complaint is insufficient to constitute waiver of the right to arbitrate. *See, e.g., Noel R. Shahan Irrevocable & Inter Vivos Trust v. Staley*, 932 P.2d 1345, 1349 (Ariz. Ct. App. 1997); *EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating Inc.*, 540 P.2d 185, 188 (Ariz. Ct. App. 1975).

82. ARIZ. REV. STAT. ANN. § 12-3009(A). There is no similar provision in the AZ-UAA. Under Colorado’s comparable provision, its court of appeals held that a letter did not give

remedy sought.”<sup>83</sup> Appearance at a hearing constitutes a waiver to an objection for lack of or insufficiency of notice, unless an objection is made at the outset of the hearing.<sup>84</sup>

#### CONSOLIDATION OF ARBITRATION PROCEEDINGS

The AZ-RUAA solves a problem common in construction disputes where there are separate arbitration agreements involving related parties and similar or the same issues are subject to different arbitration proceedings. So long as an arbitration agreement does not prohibit consolidation, the AZ-RUAA permits a court to consolidate arbitration proceedings under the following circumstances:<sup>85</sup>

1. There are separate arbitration agreements (or separate arbitration proceedings) involving the same parties, or one of the parties has an arbitration agreement (or is in an arbitration proceeding) with a third party;

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notice of the initiation of arbitration where, among other things, it only referred to a contract containing an arbitration provision, without mentioning arbitration, or when the dispute would be submitted to arbitration. *See Braata, Inc. v. Oneida Cold Storage Co.*, 2010 WL 3448824 (Colo. Ct. App. Sept. 2, 2010). The formal requirements for initiating an arbitration apply even if a party is not seeking a “claim” against the other party but starting an arbitration based upon an anticipated claim of the adverse party. *Ueoka v. Szymanski*, 114 P.3d 892, 900–01 (Haw. 2005). Notice must be given to all parties to the arbitration agreement “not just to the party against whom a person files an arbitration claim.” RUAA § 9 cmt. 4. Insufficient notice of an arbitration alone will not result in vacatur of an award. There must also be “prejudice substantially” affecting the “rights of a party.” ARIZ. REV. STAT. ANN. § 12-3023(A)(6).

83. *Id.* A rather typical agreement for the initiation of arbitration is found in the AAA Commercial Rules, R-4. A notice of arbitration that simply said one party wanted to proceed with the arbitration of a dispute with the opposing party did not comply with the similar section of Washington’s version of the RUAA because it did not describe the nature of the controversy and the remedy sought. *See Wescott Homes LLC v. Chamness*, 192 P.3d 394, 398 (Wash. Ct. App. 2008).

84. ARIZ. REV. STAT. ANN. § 12-3009(B).

85. *Id.* § 12-3010. According to the Comments, this provision makes sense for several reasons. As in the judicial forum, consolidation effectuates efficiency in conflict resolution and avoidance of conflicting results. By agreeing to include an arbitration clause, parties have indicated that they wish their disputes to be resolved in such a manner. In many cases, moreover, a court may be the only practical forum within which to effect consolidation.

RUAA § 10 cmt. 3. This section is not intended to address the validity of arbitration agreements in class-wide disputes. Heinsz, *supra* note 3, at 16. Because this section can be changed by agreement of the parties, the consolidation provisions in the American Institute of Architects A201, General Conditions, § 15.4.4.1, and Owner Architect Agreement B101, § 8.3.4.1, which permit consolidation without the necessity of court approval, would not be affected even by adopting the AZ-RUAA.

2. The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
3. The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
4. Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.<sup>86</sup>

Not only is this section a change from the AZ-UAA, it is also a departure from cases under the FAA which have consistently prohibited consolidation of arbitration proceedings absent an agreement permitting consolidation.<sup>87</sup>

#### APPOINTMENT, NEUTRAL ARBITRATORS AND DISCLOSURE

The AZ-RUAA is similar to existing law as it provides (1) that the parties' agreed upon method for selecting an arbitrator shall be followed, and (2) if that method fails, and there is no agreement to select an arbitrator or if the arbitrator is unable to act and a successor has not been appointed, the court is authorized to appoint the arbitrator.<sup>88</sup>

The rules for appointment and disclosure differ depending upon whether the arbitrator is to be a neutral arbitrator or a non-neutral arbitrator. Neutral arbitrators are expected to be "independent and impartial."<sup>89</sup> Non-neutral arbitrators, on the other hand, "may be predisposed toward the party who

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86. This provision is based on the court rulings that have taken the view that a "court should not require a party requesting consolidation to demonstrate that the parties clearly meant such a result but should apply a standard of whether it is more likely than not that the parties intended consolidation. . . . Thus, where imposition on contractual expectations will not be substantial, a court should order consolidation." Heinsz, *supra* note 3, at 14.

87. *E.g.*, *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

88. *Compare* ARIZ. REV. STAT. ANN. § 12-3011(A), *with id.* § 12-1503. Citing this provision of the Utah arbitration law, the Supreme Court of Utah held that where the parties have agreed on a method for selecting an arbitrator, "that method 'must' be followed." *Peterson & Simpson v. IHC Health Servs., Inc.*, 217 P.3d 716, 720 (Utah 2009). The court is also authorized to appoint an arbitrator if an arbitrator ceases or is unable to act during an arbitration proceeding. ARIZ. REV. STAT. ANN. § 12-3015(E). In *Mathews v. Life Care Ctrs. of Am., Inc.*, 177 P.3d 867, 868 (Ariz. Ct. App. 2008), the Arizona Court of Appeals relied upon A.R.S. § 12-1503, holding that although the parties' arbitration agreement provided for arbitration under the rules of the AAA, the court could appoint an arbitrator because the AAA was no longer administering predispute arbitration agreements between patients and healthcare facilities.

89. THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, NOTE ON NEUTRALITY (Mar. 1, 2004) [hereinafter CODE OF ETHICS], *available at* [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf).

appointed them.”<sup>90</sup> The AZ-RUAA contains a specific prohibition regarding the appointment of neutral arbitrators. Neutral arbitrators may not have a “known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party.”<sup>91</sup> This provision may be waived by the parties, even in a predispute arbitration agreement,<sup>92</sup> because parties “may choose to have a person with the type of interest or relationship described in this subsection serve as a neutral arbitrator.”<sup>93</sup>

Although the Code of Ethics for Arbitrators in Commercial Disputes and arbitration rules of the prominent administering agencies provide that arbitrators shall make certain disclosures to the parties before accepting appointment, the AZ-UAA has no such requirement.<sup>94</sup> The AZ-RUAA has changed that. All arbitrators, whether they are neutral or non-neutral arbitrators, before accepting an appointment, after making a “reasonable inquiry,”<sup>95</sup> must disclose to all parties and to the other arbitrators “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator.”<sup>96</sup> This is an objective standard.<sup>97</sup> This obligation may be waived completely in a predispute agreement by the parties as to non-neutral arbitrators, and may be waived as to neutral

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90. *Id.* at Canon X(A)(1). Non-neutral arbitrators are often appointed where an arbitration agreement provides that each party is to designate a party-appointed arbitrator, and those arbitrators are to select a third, neutral arbitrator. Under the AAA Commercial Rules, however, party-appointed arbitrators are presumed to be neutral unless the parties designate the party-appointed arbitrators to be non-neutral. AAA COMMERCIAL RULES, R-12(b).

91. ARIZ. REV. STAT. ANN. § 12-3011(B).

92. *See id.* § 12-3004(B). Because this provision may be changed only to the “extent permitted by law,” in an adhesion agreement, the stronger party cannot unilaterally choose the arbitrator. *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1990).

93. RUAA § 11 cmt. 1.

94. AAA COMMERCIAL RULES, R-16.

95. ARIZ. REV. STAT. ANN. § 12-3012(A). What constitutes a reasonable inquiry will vary depending upon the circumstances. “For instance, an attorney in a law firm may be required to check with other attorneys in the firm to determine if acceptance of an appointment as an arbitrator would result in a conflict of interest . . . .” RUAA § 12 cmt. 3.

96. ARIZ. REV. STAT. ANN. § 12-3012(A). The meaning of “evident partiality” has been extensively litigated in cases under the FAA. *See generally* RUAA § 12 cmt. 3. The United States Court of Appeals for the Ninth Circuit has held that to show evident partiality a party must establish “specific facts indicating actual bias toward or against a party” or that the arbitrator failed to disclose information that creates a reasonable impression of bias. *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 645–46 (9th Cir. 2010). In *Wages v. Smith Barney Harris Upham & Co.*, 937 P.2d 715, 716 (Ariz. Ct. App. 1997), the court of appeals held that evident partiality existed where an arbitrator failed to disclose he had brought suit on behalf of investors against the predecessor brokerage company in the arbitration, in one case with virtually identical claims.

97. RUAA § 12 cmt. 3.

arbitrators so long as the disclosure obligation is not unreasonably restricted.<sup>98</sup> This information includes, but is not limited to, any financial or personal interest in the outcome of the arbitration proceeding and any existing or past relationship with any of the parties, their counsel, a witness or another arbitrator.<sup>99</sup> This obligation continues after appointment.<sup>100</sup>

The AZ-RUAA links the issue of disclosure to the grounds on which an arbitration award may be vacated. First, if an arbitrator discloses information that would likely be considered to affect the impartiality of the arbitrator and a party timely objects to the appointment or continued service of the arbitrator, the objection “may” be a ground for vacating the award.<sup>101</sup> Second, if the arbitrator fails to disclose such information, the failure to disclose the information also may constitute a ground on which to vacate the award.<sup>102</sup>

Although the statute is silent on this point, the Comments to the RUAA indicate that the basis for vacatur is quite limited with respect to the lack of disclosure by non-neutral arbitrators. According to the Comments,<sup>103</sup> with respect to a non-neutral arbitrator, an award would be vacated only where the arbitrator fails to disclose information that amounts to “corruption,”<sup>104</sup> or “misconduct prejudicing the rights of a party.”<sup>105</sup> Moreover, as to non-neutral arbitrators, disclosure requirements may be waived in their entirety.<sup>106</sup>

There is a specific consequence if a neutral arbitrator fails to disclose a “known, direct and material interest in the outcome of the arbitration or a known, existing and substantial relationship with a party.” In such cases, the arbitrator is “presumed” to act with evident partiality.<sup>107</sup> In a predispute

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98. ARIZ. REV. STAT. ANN. § 12-3004(A), (B)(3).

99. *Id.* § 12-3012(A)(1)–(2).

100. *Id.* § 12-3012(B). The Code of Ethics provides that for “a reasonable period of time after the decision of a case” arbitrators should avoid circumstances that would “reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation” of a particular relationship or interest. CODE OF ETHICS, Canon I(C).

101. ARIZ. REV. STAT. ANN. § 12-3012(C). A timely objection is one normally made prior to the arbitration hearing or within a reasonable time after the party learns or should have learned of the lack of disclosure. RUAA § 12 cmt. 4. This section is permissive, the intent being to give courts “wider latitude in deciding whether to vacate an award.” *Id.*

102. ARIZ. REV. STAT. ANN. § 12-3012(D).

103. RUAA § 12 cmt. 5.

104. ARIZ. REV. STAT. ANN. § 12-3023(A)(2)(b).

105. *Id.* § 12-3023(A)(2)(c).

106. *See id.* § 12-3004(B)(3); RUAA § 4 cmt. 4(b).

107. ARIZ. REV. STAT. ANN. § 12-3012(E). “The shifting of the burden of proof in this limited and somewhat extreme situation will require the neutral, who is in the best position to know the exact nature and extent of the interest or relationship, to explain the matter.” Heinsz, *supra* note 3, at 19. Furthermore, it would be the “burden of the party defending the award to

arbitration agreement, the parties cannot “unreasonably restrict” the obligations of neutral arbitrators to disclose facts required by this section.<sup>108</sup> Finally, if the parties’ arbitration agreement adopts particular procedures for challenges to an arbitrator, “substantial compliance” with those procedures is required as a condition precedent to a motion to vacate an award on the grounds set forth in section 12-3023(A)(2).<sup>109</sup>

### IMMUNITY

Although the Arizona Supreme Court has recognized that individuals such as arbitrators who perform quasi-judicial functions “are clothed with an immunity analogous to judicial immunity,”<sup>110</sup> until the adoption of the AZ-RUAA no Arizona statute granted such immunity to arbitrators. This immunity applies not only to the arbitrator, but to an “arbitration organization” as well.<sup>111</sup> Arbitral immunity is defined as follows:

An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity.<sup>112</sup>

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rebut the presumption by showing that the award was not tainted by the non-disclosure or there in fact was no prejudice.” RUAA § 12 cmt. 4.

108. ARIZ. REV. STAT. ANN. § 12-3004(B)(3).

109. *Id.* § 12-3012(F).

110. In *J.J. Craviolini v. Scholer & Fuller Associate Architects*, 357 P.2d 611, 613 (Ariz. 1961), the Arizona Supreme Court held that when an architect is empowered by parties to resolve disputes between them, the architect is functioning as an arbitrator and is entitled to immunity. On the facts of the case before it, the court found that the claim against the architect did not involve the resolution of disputes. The facts in the *Craviolini* decision were distinguished in *Blecick v. School District No. 18 of Cochise County*, 406 P.2d 750, 756 (Ariz. Ct. App. 1965), where the court found that the refusal of the architects to issue a final certificate was an act “done in their capacity as arbitrators.” Citing *Craviolini*, the Arizona Court of Appeals, in a case involving a defamation claim, has approved a “corresponding immunity for witnesses who participate in arbitration proceedings.” *Yeung v. Maric*, 232 P.3d 1281, 1285 (Ariz. Ct. App. 2010).

111. ARIZ. REV. STAT. ANN. § 12-3001(1). The doctrine of judicial immunity has been applied to arbitration organizations; they “are granted absolute immunity for a broad category of acts performed during the course of an arbitration proceeding.” *M.H. Alexander v. Am. Arbitration Ass’n*, 2001 WL 868823, \*4 (N.D. Cal. July 27, 2001).

112. ARIZ. REV. STAT. ANN. § 12-3014(A). One attorney in an arbitration asked the arbitrator to remove an opposing counsel from the arbitration because of his conduct. The arbitrator denied the request and called a recess. During the recess, the plaintiff alleged that the attorney whom he sought to eject assaulted him in the lobby. The arbitrator did not observe the altercation. In a suit against the arbitrator and the arbitral organization, a New Jersey court, citing its version of the RUAA and common law, dismissed the case holding that the “act of calling a recess and denying an application to remove an attorney from an arbitration proceeding

The immunity granted by statute is intended to supplement “any immunity under other law.”<sup>113</sup> “[A]rbitral immunity has a two-fold goal; to protect arbitrators from suit, and to ensure that there is a body of individuals willing to perform the service.”<sup>114</sup> Arbitral immunity is not lost despite the failure of an arbitrator to make proper disclosures under section 12-3012.<sup>115</sup>

With two exceptions, where an arbitrator’s ruling is the subject of litigation, neither the arbitrator nor a representative of an arbitration organization is “competent to testify” regarding the matter, nor can either be required to produce records as to any “statement, conduct, decision or ruling occurring during the arbitration proceeding, to the same extent as a judge . . . acting in a judicial capacity.”<sup>116</sup> The first exception involves claims by an arbitrator or arbitration organization “against a party to the arbitration proceeding.”<sup>117</sup> It would seem that this situation would arise only where a claim is brought against a party for nonpayment of fees. If a claim is brought by an arbitrator to collect fees, and a counterclaim is brought attacking the arbitration award, the arbitrator would be allowed to testify as to the claim for fees, but the “arbitrator cannot be required to testify or produce records as to the party’s counterclaim attacking the merits of the award.”<sup>118</sup>

The second exception concerns the situation where a motion to vacate an award is made on the grounds set forth in section 12-3023(A)(1) and (2), and where a prima facie case for vacating the award is made.<sup>119</sup> These provisions involve claims that an award was “procured by corruption, fraud or other undue means” or where there was “evident partiality” by a neutral arbitrator, corruption by an arbitrator or “misconduct by an arbitrator prejudicing the rights of a party.”

If an action is brought against an arbitrator or an arbitration organization or its representative, or if a party seeks to compel testimony or the production of documents from the foregoing, and if a court finds that immunity applies or if it finds the arbitrator not competent to testify, the

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falls directly within the adjudicative functions of the arbitrator.” *Malik v. Ruttenberg*, 942 A.2d 136, 142 (N.J. Super. Ct. App. Div. 2008).

113. ARIZ. REV. STAT. ANN. § 12-3014(B).

114. *Cort v. Am. Arbitration Ass’n*, 795 F. Supp. 970, 973 (N.D. Cal. 1992).

115. ARIZ. REV. STAT. ANN. § 12-3014(C).

116. *Id.* § 12-3014(D). Judges have been permitted to testify in court proceedings in a limited category of situations. *Phillips v. Clancy*, 733 P.2d 300, 304-05 (Ariz. Ct. App. 1986).

117. ARIZ. REV. STAT. ANN. § 12-3014(D)(1).

118. RUA § 14 cmt. 5.

119. ARIZ. REV. STAT. ANN. § 12-3014(D)(2). “A party’s allegation of these grounds without a showing of independent, objective evidence should be insufficient to require an arbitrator to testify or produce records from the arbitration proceeding.” RUA § 14 cmt. 5.

court “shall” award the arbitrator, arbitrator organization or their representative reasonable attorneys’ fees and other reasonable expenses of litigation.<sup>120</sup>

#### THE ARBITRATION PROCESS

The procedures governing an arbitration hearing are set forth in section 12-3015.<sup>121</sup> This section establishes default rules, as it is one of the sections of the AZ-RUAA that can be waived by the parties in a predispute arbitration agreement.<sup>122</sup> Under these default rules, an arbitrator “may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.”<sup>123</sup> Consistent with the arbitrator’s power to manage the arbitral process, an arbitrator may hold conferences with the parties before the arbitration hearing and “among other matters . . . determine the admissibility, relevance, materiality and weight of any evidence.”<sup>124</sup>

Like the AZ-UAA, the AZ-RUAA provides that at the hearing, the parties have a “right to be heard, to present evidence material to the controversy and to cross-examine witnesses.”<sup>125</sup> Clarifying an area of uncertainty under the existing law, the AZ-RUAA grants to arbitrators the power to decide a request for summary disposition of a claim or issue.<sup>126</sup>

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120. ARIZ. REV. STAT. ANN. § 12-3014(E).

121. The comparable provision in the AZ-UAA is section 12-1505.

122. See ARIZ. REV. STAT. ANN. § 12-3004. Where parties adopt the rules of an arbitration organization, such as the AAA, those rules become part of the arbitration agreement. A.P. Brown Co. v. Superior Court, 490 P.2d 867, 869 (Ariz. Ct. App. 1971).

123. ARIZ. REV. STAT. ANN. § 12-3015(A). “The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute . . .” AAA COMMERCIAL RULES, R-30(b).

124. ARIZ. REV. STAT. ANN. § 12-3015(A). The AAA Commercial Rules provide that an arbitrator “shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.” AAA COMMERCIAL RULES, R-31(b). “It should be noted that the rules of evidence are inapplicable in an arbitration proceeding . . .” RUAA § 15 cmt. 1. If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but the arbitration hearing must be conducted by all of the arbitrators. ARIZ. REV. STAT. ANN. § 12-3013. The comparable provision in the AZ-UAA is section 12-1504 (“The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this article.”).

125. *Id.* § 12-3015(D).

126. *Id.* § 12-3015(B). The uncertainty in the AZ-UAA was created by the section that provides that parties “are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.” *Id.* § 12-1505(2). Some arbitrators have speculated that this language precluded consideration of motions for summary disposition and others have expressed reluctance to grant motions for summary disposition because one of the grounds for vacatur of an award is where an arbitrator refused to hear evidence material to

This would presumably include requests comparable to motions to dismiss for failure to state a claim for relief, motions for judgment on the pleadings, and motions for summary judgment. The arbitrator is permitted to grant summary disposition if all parties agree or if one party makes a request for summary disposition and the other party has a reasonable opportunity to respond.<sup>127</sup>

The AZ-RUAA establishes a number of procedural requirements for the scheduling of the arbitration hearing:<sup>128</sup>

1. The arbitrator shall set the time and place of the hearing and give notice at least five days before the hearing begins. Unless a party objects to the sufficiency of the notice at the beginning of the hearing, the party's appearance waives the objection.
2. A hearing may be adjourned at the request of a party, for good cause shown, or on the arbitrator's own initiative.
3. A hearing may not be postponed to a time later than that set forth in the arbitration agreement unless the parties agree to a later date.
4. A decision may be made based on the evidence "produced" even if a party who was notified of the hearing does not appear.
5. A court may direct an arbitrator to conduct the hearing "promptly" and render a "timely" decision.
6. A party to an arbitration proceeding may be represented by a lawyer.<sup>129</sup>

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the dispute. *See id.* §§ 12-1512(A)(4), 12-3023(A)(3). This concern is undoubtedly overstated. A study of 182 state and federal court cases in 2004 in which a party sought to vacate an award revealed that in only twenty-four of those cases did a party argue that the award should be vacated because the arbitrator refused to hear evidence material to the controversy. In only three of these cases was the award vacated. J. Lani Bader et al., *Vacating Arbitration Awards*, DISP. RES. MAG., Summer 2005, at 23.

127. ARIZ. REV. STAT. ANN. § 12-3015(B)(1)–(2).

128. *Id.* § 12-3015(C).

129. *Id.* § 12-3016. The right to be represented by counsel is a nonwaivable right in a predispute agreement to arbitrate. This provision is similar to the AZ-UAA. *Id.* § 12-1506. The AAA Commercial Rules provide that a party may be represented by counsel "or other authorized representative." AAA COMMERCIAL RULES, R-24. Where parties have adopted the AAA Commercial Rules a question periodically arises whether a party in arbitration in Arizona may be represented by someone who is not a licensed attorney. Because the Arizona Supreme Court has held that the representation of a party in private arbitration proceedings constitutes the practice of law, *In re Creasy*, 12 P.3d 214, 216–18 (Ariz. 2000), the AAA Commercial Rules could certainly not displace a decision of the Arizona Supreme Court. A related issue has to do with whether an attorney licensed in another jurisdiction can represent a party in an arbitration in Arizona. A lawyer licensed in another jurisdiction can represent a party in an arbitration

In addition to establishing greater detail for the regulation of the arbitration process, the AZ-RUAA grants to arbitrators substantial authority in compelling the attendance of witnesses at arbitration proceedings. Arbitrators may issue subpoenas for the attendance of a witness, and for the production of records and “other evidence” at any hearing, and may administer oaths.<sup>130</sup> The method for service of a subpoena is not waivable in a predispute arbitration agreement;<sup>131</sup> a subpoena must be served in the same manner as a subpoena in a civil action.<sup>132</sup> “All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action” in an Arizona court.<sup>133</sup>

Unlike the AZ-UAA, the AZ-RUAA contemplates greater use of depositions in arbitration. To make the arbitration proceeding “fair, expeditious and cost effective,” a party, or a witness, can request that the arbitrator permit a deposition to be used as evidence.<sup>134</sup> With respect to discovery in general, discovery is permissible “as the arbitrator decides is appropriate . . . taking into account the needs of the parties . . . and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective.”<sup>135</sup> The Comments to the RUAA provide insight into the intent of this provision:

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(mediation or other alternative dispute resolution proceeding) in Arizona “if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission.” ARIZ. RULES OF PROF’L CONDUCT R. 5.5(c)(3) (2003).

130. Compare ARIZ. REV. STAT. ANN. § 12-3017(A), with *id.* § 12-1507(A).

131. *Id.* § 12-3004(B)(1).

132. *Id.* § 12-3017(A). The service of subpoenas in civil actions is provided for in Rule 45 of the Arizona Rules of Civil Procedure. The rule also provides that the failure of a party to obey a subpoena may be deemed a contempt of court. ARIZ. R. CIV. P. 45.

133. ARIZ. REV. STAT. ANN. § 12-3017(F). The payment of costs for producing documents in response to a subpoena in a judicial proceeding is covered by section 12-351. In a judicial proceeding, the failure of a person without adequate excuse to obey a subpoena is deemed a contempt of court. ARIZ. R. CIV. P. 45(f). In addition, a party may enforce a subpoena issued by a court through the issuance of a Civil Arrest Warrant authorized by Rule 64.1 of the Arizona Rules of Civil Procedure. Witnesses who live outside Arizona are not within the subpoena power of a court, and therefore not within the subpoena power of an arbitrator. See *Ponderosa Plaza v. Siplast*, 888 P.2d 1315, 1321 (Ariz. Ct. App. 1993). But see *infra* notes 144–46 and accompanying text.

134. ARIZ. REV. STAT. ANN. § 12-3017(B).

135. *Id.* § 12-3017(C). “The Drafting Committee intended that the full panoply of discovery mechanisms under modern rules of civil procedure would normally not be appropriate for arbitration unless the parties specifically incorporate them into their arbitration agreement.” Heinsz, *supra* note 3, at 46–47.

[U]nless the contract specifies to the contrary, discretion rests with the arbitrators whether to allow discovery. The discovery procedure . . . is intended to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties. Because [this section] is waivable . . . the provision is intended to encourage parties to negotiate their own discovery procedures.

At the same time, it should be clear that in many arbitrations discovery is unnecessary and that the discovery contemplated . . . is not coextensive with that which occurs in the course of civil litigation under federal or state rules of civil procedure. Although [the section] allows an arbitrator to permit discovery so that parties can obtain necessary information, the intent of the language is to limit that discovery by considerations of fairness, efficiency, and cost. Because [the section] is subject to the parties' arbitration agreement, they can decide to eliminate or limit discovery as best suits their needs. However, the default standard . . . is meant to discourage most forms of discovery in arbitration.<sup>136</sup>

A further comment of the Drafting Committee is instructive: “The simplified, straightforward approach to discovery reflected in [this section] is premised on the *affirmative duty of the parties to cooperate in the prompt and efficient completion of discovery.*”<sup>137</sup>

The AZ-UAA is silent on the topic of discovery. Although the Comments to the RUAA characterize the UAA as not permitting subpoenas and depositions for prehearing discovery,<sup>138</sup> the arbitration practice in Arizona typically includes prehearing discovery through subpoenas and depositions. This practice is specifically incorporated in the AZ-RUAA which permits subpoenas and depositions to be used for discovery without distinguishing between party and nonparty witnesses.<sup>139</sup> This is a significant departure from the FAA where courts have reached different conclusions over whether an arbitrator has subpoena power to permit prehearing discovery directed at nonparties.<sup>140</sup>

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136. RUAA § 17 cmt. 3.

137. *Id.* § 17 cmt. 4 (emphasis added).

138. *Id.* § 17 cmt. 2.

139. *See* ARIZ. REV. STAT. ANN. § 12-3017(C). Because this section is waivable, it is “intended to encourage parties to negotiate their own discovery procedures.” RUAA § 17 cmt. 3.

140. *Compare* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008) (an arbitrator's subpoena authority under section 7 of the FAA does not include the authority to subpoena nonparties for prehearing discovery), *with In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 872 (8th Cir. 2000) (implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of

The AZ-RUAA grants clear powers to the arbitrator to enforce discovery orders. In addition to the arbitrator's power to issue subpoenas, the arbitrator may order a party to comply with discovery-related orders and "take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action" in Arizona.<sup>141</sup> In addition, a party or the arbitrator may seek enforcement of a subpoena from the court "in the manner for enforcement of subpoenas in a civil action."<sup>142</sup> Similarly, an arbitrator may also issue protective orders "to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in" an Arizona court.<sup>143</sup>

The AZ-RUAA also is intended to facilitate the arbitration process occurring in another state. An Arizona court is granted the power to enforce a subpoena or discovery order for the attendance of a witness in Arizona or the production of records in Arizona in connection with an arbitration proceeding in another state on "conditions determined by the court so as to make the arbitration proceeding fair, expeditious and cost effective."<sup>144</sup> If another state has adopted the RUAA, this provision will assist parties in an Arizona arbitration in obtaining the testimony or production of documents in that state. Under this provision a party may take a subpoena issued by an arbitrator in Arizona directly to a court in the other state where the subpoena can be enforced by that court subject to the provisions of that

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relevant documents for review by a party prior to the hearing). There is no controlling authority on this issue in the Ninth Circuit. Because of the "unclear case law," this section "specifically states that arbitrators have subpoena authority for discovery matters under the RUAA." RUAA, § 17 cmt. 6.

141. ARIZ. REV. STAT. ANN. § 12-3017(D). This section grants to arbitrators all of the power judges have to enforce discovery orders. *See* ARIZ. R. CIV. P. 37. *See generally* Philip D. O'Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*, 60 DISP. RES. J. 60 (Nov. 2005–Jan. 2006). Even in the absence of specific statutory authority arbitrators have been found to have the power to impose sanctions under the bad faith exception to the American Rule regarding the award of attorneys' fees, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064–65 (9th Cir. 1991), and the authority granted to arbitrators under the terms of an arbitration agreement. *E.g.*, *Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86–87 (2d Cir. 2009) (a broad arbitration clause confers authority on arbitrators to sanction a party that participates in bad faith); *Pollin v. Kellwood Co.*, 103 F. Supp.2d 238, 242 (S.D.N.Y. 2000) (agreement permitted arbitrators to grant any remedy or relief that would be available in court).

142. ARIZ. REV. STAT. ANN. § 12-3017(A). Because arbitration awards are not self-enforcing, "a nonparty who disagrees with a subpoena or other order issued by an arbitrator simply need not comply. At that point the party to the arbitration proceeding who wants the nonparty to testify or produce information must proceed in court to enforce the arbitral order." RUAA § 17 cmt. 8.

143. ARIZ. REV. STAT. ANN. § 12-3017(E).

144. *Id.* § 12-3017(G).

state's version of the RUAA.<sup>145</sup> A subpoena or discovery order issued by an arbitrator in another state must be served in Arizona as provided for under Rule 45 of the Arizona Rules of Civil Procedure, and may be enforced as permitted under that Rule.<sup>146</sup>

#### THE ARBITRATION AWARD

An arbitrator must make a “record” of an award which must be signed or “otherwise authenticated” by each arbitrator who concurs with the award.<sup>147</sup> The arbitrator or arbitration organization must give “notice” of the award, including a copy of the award, to each party to the arbitration.<sup>148</sup> The notice provision is one that is waivable and can therefore be superseded by the parties' agreement.<sup>149</sup>

An arbitration award must be made within the time specified in the parties' arbitration agreement, or if not specified therein, by the court; the parties may agree to extend the time or the court may order that the time be extended.<sup>150</sup> A party waives an objection to an untimely award if an objection is not made before the party receives notice of the award.<sup>151</sup>

A preaward ruling by an arbitrator may be incorporated into an award.<sup>152</sup> When an award incorporates a preaward ruling, the prevailing party may seek from a court an expedited ruling to confirm the award, in which case the court shall summarily decide the issue.<sup>153</sup> An arbitrator's decision denying a request for a preaward ruling is not subject to judicial review until after a final award is entered.<sup>154</sup> Although preaward rulings are subject

145. Heinsz, *supra* note 3, at 50–51.

146. *Id.*

147. ARIZ. REV. STAT. ANN. § 12-3019(A). The term “otherwise authenticated” is “intended to conform with the Electronic Signatures in Global and National Commerce Act.” This means that an “arbitrator can execute an award by an electronic signature which is intended to mean ‘an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.’” RUAA § 19 cmt. (citation omitted). The comparable provision in the AZ-UAA is section 12-1508(A).

148. ARIZ. REV. STAT. ANN. § 12-3019(A).

149. *See id.* § 12-3004.

150. *Id.* § 12-3019(B). The comparable provision in the AZ-UAA is section 12-1508(B). The AAA Commercial Rules provide that an award shall be made no later than thirty days from the closing of the hearing. AAA COMMERCIAL RULES, R-41.

151. ARIZ. REV. STAT. ANN. § 12-3019(B).

152. *Id.* § 12-3018. The AZ-UAA does not address preaward rulings by arbitrators.

153. “The intent of the term ‘expedited’ is that a court should, to the extent possible, advance on the docket a matter involving the enforcement of an arbitrator's preaward ruling in order to preserve the integrity of the arbitration proceeding which is underway.” RUAA § 18 cmt. 2.

154. *Id.* § 18 cmt. 4.

to vacatur, modification or correction, there is no provision for an appeal from a court decision on a preaward ruling.<sup>155</sup>

#### CHANGE OF AWARD BY THE ARBITRATOR

Although an arbitrator is *functus officio* and is without authority to redetermine the merits of the arbitration after a final award is made, there are certain exceptions in the AZ-RUAA.<sup>156</sup> These exceptions are codified in section 12-3020.<sup>157</sup> To change an arbitration award, the moving party must make a motion to the arbitrator within twenty days after the party receives notice of the award.<sup>158</sup> An opposition to the motion must be made within ten days thereafter.<sup>159</sup> The grounds on which an award may be changed include the following:

- there is an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property in the award;
- the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted;
- the arbitrator has not made a final and definite award on a claim submitted by the parties to the arbitration proceeding; or
- to clarify the award.

A court can also refer a matter back to the arbitrator to modify or correct an award. If a motion is pending in court to confirm, vacate, modify or correct an award under sections 12-3022 to -3024, the court can submit “a claim” to the arbitrator to modify or correct the award for any of the reasons set forth

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155. See ARIZ. REV. STAT. ANN. § 12-2101.01.

156. “The *functus officio* doctrine provides that an arbitration panel is without authority to reconsider an issue once the panel has issued a final decision . . . .” U.S. Life Ins. Co. v. Superior Nat’l Ins. Co., 591 F.3d 1167, 1177 n.11 (9th Cir. 2010). Under federal arbitration law there are exceptions to this rule: “an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if an award is not complete, and clarify an ambiguity in the award.” McClatchy Newspapers v. Cent. Valley Typographical Union No. 46, 686 F.2d 731, 734 n.1 (9th Cir. 1982). Unlike the RUAA, however, the FAA has no statutory grounds by which an award may be modified or corrected. By their agreement, parties can also grant an arbitrator the power to modify or correct an award. AAA COMMERCIAL RULES, R-46.

157. Under the comparable provision of the New Jersey arbitration law, a court held that this section did not permit an “arbitrator to change his or her mind or to reconsider his or her decision in the guise of clarification.” Kimm v. Blisset, LLC, 905 A.2d 887, 897 (N.J. Super. Ct. App. Div. 2006). Under the AZ-UAA, the rules permitting a modification or correction of an award by an arbitrator are found in section 12-1509.

158. ARIZ. REV. STAT. ANN. § 12-3020(B).

159. *Id.* § 12-3020(C).

above.<sup>160</sup> If an award is modified or corrected as provided for under section 12-3020, a new award would be issued pursuant to section 12-3019, subject to confirmation, vacatur, and further judicial modification or correction under sections 12-3022 to -3024, respectively.<sup>161</sup>

#### REMEDIES, FEES AND EXPENSES OF ARBITRATION

Unlike the AZ-UAA which is silent on the issue,<sup>162</sup> the AZ-RUAA grants to arbitrators the explicit power to award punitive damages or “other exemplary relief” if such an award is authorized by law in a civil action involving the same claim.<sup>163</sup> The evidence presented at the hearing must justify the award of punitive damages under the legal standard otherwise applicable to the claims.<sup>164</sup> If an arbitrator awards punitive damages, the arbitrator must specify the facts justifying the award as well as the legal basis of the award; the amount of punitive damages must be stated separately in the award.<sup>165</sup>

In a significant change from current law, the AZ-RUAA authorizes an arbitrator to award attorneys’ fees and “other reasonable expenses of arbitration” if an award for fees and expenses “is authorized by law in a

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160. *Id.* § 12-3020(D).

161. *Id.* § 12-3020(E).

162. Because the AZ-UAA makes no reference to punitive damages a question arises whether punitive damages may now be awarded in arbitrations under the AZ-UAA. This is unlike a situation where the legislature changes the language of a statute in which case courts commonly conclude the legislature intended to change the law. *Brousseau v. Fitzgerald*, 675 P.2d 713, 715 (Ariz. 1984). Because it has been well established that arbitrators have the authority to award punitive damages, *see* RUAA § 21 cmt. 1, and because the issue of punitive damages in arbitration was not singled out for legislative action but was part of the creation of a new statutory scheme, *Rowe Int’l, Inc. v. Ariz. Dep’t of Revenue*, 796 P.2d 924, 930 (Ariz. Ct. App. 1990), I believe that the new provision clarifies the power arbitrators already have under the AZ-UAA.

163. Under the wording of this section, an award of punitive damages must be authorized under applicable law. The “parties by agreement cannot confer such authority on an arbitrator where the arbitrator by law could not otherwise award such relief.” RUAA § 21 cmt. 1.

164. ARIZ. REV. STAT. ANN. § 12-3021(A). “Exemplary relief” is the same as punitive damages. *Cf.* *Haralson v. Fisher Surveying, Inc.*, 31 P.3d 114, 120 (Ariz. 2001) (Jones, J., concurring). In Arizona, punitive damages in a civil action are appropriate only if the defendant’s conduct or motive involves “some element of outrage similar to that usually found in crime.” *Gurule v. Ill. Mut. Life & Cas. Co.*, 734 P.2d 85, 86 (Ariz. 1987) (internal quotations omitted). A defendant must act “with a knowing, culpable state of mind, or defendant’s conduct was so egregious that the requisite mental state can be inferred.” *Id.*

165. ARIZ. REV. STAT. ANN. § 12-3021(E). This language permits a reviewing court to “pass upon the legal propriety of a punitive damages award.” *Heinsz*, *supra* note 3, at 24. Thus, this section establishes a standard of judicial review of punitive damage awards different than the standard of judicial review applicable to other arbitral rulings.

civil action involving the same claim,” or by agreement of the parties.<sup>166</sup> Under the AZ-UAA, citing section 12-1510, the Arizona Supreme Court in *Canon School District No. 50 v. W.E.S. Construction Co.* held that absent an agreement of the parties, neither an arbitrator nor a court may award attorneys’ fees to the prevailing party in an arbitration.<sup>167</sup> The AZ-RUAA overrules *Canon School District* on this issue and authorizes an arbitrator to award attorneys’ fees if permissible in a civil action involving the same claim. Therefore, section 12-341.01(A) will be applicable in all arbitrations where a contract claim has been presented.<sup>168</sup>

The AZ-RUAA, like the AZ-UAA, grants to arbitrators broad power to fashion remedies, even those that would not be permissible in court:

As to all remedies other than those authorized by subsections A and B of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award . . . or for vacating an award . . . .<sup>169</sup>

The intent of this provision is to allow

an arbitrator to order broad relief even that beyond the limits of courts which are circumscribed by principles of law and equity. . . . The purpose of including this language . . . was to insure that arbitrators have a great deal of creativity in fashioning remedies; broad remedial discretion is a positive aspect of arbitration.<sup>170</sup>

This section, however, is waivable in a predispute arbitration agreement so that parties can agree to limit or eliminate certain remedies “to the extent permitted by law.”<sup>171</sup>

166. ARIZ. REV. STAT. ANN. § 12-3021(B).

167. 882 P.2d 1274, 1278 (Ariz. 1994).

168. This statute provides that in “any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees.” ARIZ. REV. STAT. ANN. § 12-341.01(A).

169. *Id.* § 12-3021(C). A comparable provision in the AZ-UAA provides that the “fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.” *Id.* § 12-1512(A)(5). Of course, an arbitrator’s power is not without limits. *E.g.*, *Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009) (an arbitration award must “draw its essence” from the parties’ agreement).

170. RUAA § 21(c) cmt. 3; *see Heinsz, supra* note 3, at 22. The Supreme Court of Utah cited this provision in Utah’s arbitration law holding that the “broad grants” of authority to arbitrators were an additional reason why the court permitted an arbitrator to remove members of a limited liability company. *Duke v. Graham*, 158 P.3d 540, 546 (Utah 2007); *cf. Snowberger v. Young*, 536 P.2d 1069, 1072 (Ariz. Ct. App. 1975). In my experience, it would be extremely rare for an arbitrator to award a remedy not permissible in court.

171. ARIZ. REV. STAT. ANN. § 12-3004(A).

The AZ-RUAA also permits an arbitrator to award the expenses of arbitration if an award of expenses is authorized in a civil action.<sup>172</sup> Thus, the use of the word “expenses” should have the same meaning as “costs” which are awarded to the successful party in civil litigation.<sup>173</sup> In a separate provision, the AZ-RUAA provides that an “arbitrator’s expenses and fees, together with other expenses, must be paid as provided in the award.”<sup>174</sup> This section appears to create a special obligation by the parties to pay the arbitrator’s expenses and fees which are not covered by Arizona’s cost statutes. The use of the phrase “together with other expenses,” is confusing. In general, expenses are covered under section 12-3021(B) and are the same expenses that may be awarded in a civil action involving the same claim—“costs.” Expenses of the arbitrator are covered under section 12-3021(D). The only category of expenses seemingly not specifically addressed would be the fees, if any, paid to an arbitration organization. This is certainly an expense of arbitration and presumably is included within the phrase “other expenses.”

#### CONFIRMATION, VACATUR AND MODIFICATION OF THE AWARD

After a party receives notice of an award, a party may move the court for an order confirming the award. The court “shall issue a confirming order” unless the award is modified or vacated.<sup>175</sup> The AZ-RUAA contains no time limit within which such a motion must be filed.<sup>176</sup> The Drafting Committee of the RUAA rejected language from the FAA that limits such a motion to one year. The Comments to the RUAA indicate it was the “consensus” of the Drafting Committee that a state’s general statute of limitations for the filing and execution of a judgment should apply.<sup>177</sup> In Arizona there is a

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172. The limitation on expenses under the AZ-RUAA to those recoverable in a comparable civil action constitutes a significant change as no such restriction exists under the AZ-UAA. ARIZ. REV. STAT. ANN. § 12-1510.

173. *Id.* § 12-3021(B). See generally Lisa Duran & Alison Pulaski Carter, *Recovery of Costs and Fees for Non-Lawyer Services*, in ARIZONA ATTORNEYS’ FEES MANUAL §§ 9.1–9.6 (2010 ed.). In addition to the recovery of expenses permitted in a comparable civil action, parties in their arbitration agreement may authorize the award of other expenses not otherwise authorized by law. RUAA § 21 cmt. 2.

174. ARIZ. REV. STAT. ANN. § 12-3021(D).

175. *Id.* § 12-3022. A Hawaii appellate court rejected the argument that a case is moot where an award has been satisfied. Applying its adoption of the RUAA, the court held that an award should be confirmed regardless of whether the award has been satisfied prior to confirmation. *Mikelson v. United Servs. Auto. Ass’n*, 227 P.3d 559, 565 (Haw. Ct. App. 2010).

176. There is also no time limit under existing law. ARIZ. REV. STAT. ANN. § 12-1511; *Fisher v. Nat’l Gen. Ins. Co.*, 965 P.2d 100, 103 (Ariz. Ct. App. 1998).

177. RUAA § 22 cmt. 2.

five-year statute of limitations for actions brought to execute on a judgment.<sup>178</sup>

The AZ-RUAA is significantly different than the AZ-UAA with respect to the interplay between motions to confirm an award and opposition to confirmation. Under the AZ-UAA, after a party moves to confirm an award, the award will be confirmed after the expiration of twenty days, unless the opposing party moves to vacate the award.<sup>179</sup> In contrast, under the AZ-RUAA, a party may move to vacate an award up to ninety days after the party receives notice of the award or up to ninety days after the moving party receives notice of a modified or corrected award.<sup>180</sup> If the moving party alleges that the award was “procured by corruption, fraud or other undue means,” the motion must be made within ninety days after the party learns of the basis of the motion or when the basis should have been known through the exercise of reasonable care.<sup>181</sup> Thus, even if a party promptly moves to confirm an award, the AZ-RUAA requires that before an award is confirmed, a court must wait ninety days from when the opposing party received notice of the award. In some cases, that delay could be very disadvantageous to the prevailing party.<sup>182</sup>

The statutory grounds set forth in the AZ-RUAA providing for judicial review of arbitration awards are:<sup>183</sup>

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178. ARIZ. REV. STAT. ANN. § 12-1551.

179. *Id.* § 12-1511. The AZ-UAA contains no time limit within which a motion to vacate an award must be filed. *Id.* § 12-1512; *Morgan v. Carillon Invest., Inc.*, 109 P.3d 82, 82–83 (Ariz. 2005). Under the AZ-UAA, to avoid the uncertainty of an indefinite time within which a motion to vacate may be filed, by filing a motion to confirm an award under section 12-1511, a party opposing the motion has twenty days within which to oppose the motion under section 12-1512.

180. ARIZ. REV. STAT. ANN. § 12-3023(B).

181. *Id.*

182. The Oregon adoption of the RUAA has a better alternative providing that after a motion to confirm an award is filed, the court must confirm the award unless a motion to vacate or modify the award is filed within twenty days. OR. REV. STAT. § 36.700(1) (Westlaw through 2010 Legis. Sess.).

183. ARIZ. REV. STAT. ANN. § 12-3023(A). The comparable section in the AZ-UAA is section 12-1512. The section on vacatur is one that cannot be waived by the parties, even after a dispute arises. *Id.* § 12-3004(C). “Parties cannot waive or vary the statutory grounds for vacatur . . . .” RUAA § 4 cmt. 4(e). An agreement to preclude completely any judicial review of an arbitration award has been held unenforceable because it deprives a court of the ability to follow the standards of review which “themselves embody legislative and judicial determinations as to the appropriate level and scope of review.” *Van Duren v. Rzasa-Ormes*, 926 A.2d 372, 381 (N.J. Super. Ct. 2007). Similarly, in *Optimer International, Inc. v. RP Bellevue, LLC*, 214 P.3d 954, 958 (Wash. Ct. App. 2009), the parties’ arbitration agreement provided that the decision of the arbitrator would be final and nonappealable. After the award was entered, the losing party appealed claiming that the arbitrator exceeded his powers. The court of appeals held that the restriction on judicial review of the award in the arbitration agreement was invalidated by the provision in the Washington statute, identical to the AZ-RUAA, that prohibited any waiver of

- the award was procured by corruption, fraud or other undue means;<sup>184</sup>
- there was evident partiality by an arbitrator appointed as a neutral arbitrator;<sup>185</sup>
- there was corruption by an arbitrator;
- there was misconduct by an arbitrator prejudicing the right of a party to the arbitration proceeding;
- the arbitrator refused to postpone the hearing on showing of sufficient cause;
- the arbitrator refused to consider evidence material to the controversy;
- the arbitrator conducted the hearing contrary to the provisions in section 12-3015 so as to prejudice substantially the rights of a party to the arbitration;<sup>186</sup>

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the grounds for judicial review of arbitration awards. *Id.* at 960. The court also rejected the argument that the Washington statute was unconstitutional as an impairment of contract rights. *Id.* These decisions seem highly questionable at least where the parties to an arbitration agreement have comparable bargaining strength. Indeed, courts have upheld these agreements where the parties have clearly indicated their intent to eliminate all judicial review. *See Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 251–52 (9th Cir. 1973). On the other hand, in an adhesion contract it would undoubtedly be unconscionable for the stronger party to compel the weaker party to give up any judicial review of an arbitration award.

184. Following cases interpreting section 10 of the FAA, the Arizona Court of Appeals held under the AZ-UAA, that “undue means” requires proof of intentional misconduct amounting to bad faith in the procurement of the arbitration award. *FIA Card Servs., N.A. v. Levy*, 200 P.3d 1020, 1022 (Ariz. Ct. App. 2008). An arbitration award was vacated on the grounds of undue means where the court found that the arbitrator’s contact with counsel for a party “was impermissible under the rules of arbitration and tainted the deliberation proceedings.” *Goldsberry v. Hohn*, 583 P.2d 1360, 1363 (Ariz. Ct. App. 1978).

185. Following federal cases interpreting the comparable provision in section 10 of the FAA, the Arizona Court of Appeals, noting that each case must be decided on its specific facts, held “evident partiality” means the “appearance of bias” or where a reasonable person would conclude that an arbitrator was “partial to one party to the arbitration.” *Wages v. Smith Barney Harris Upham & Co.*, 937 P.2d 715, 720–21 (Ariz. Ct. App. 1997). The Oregon appellate court defined evident partiality this way in a recent interpretation of the same provision in its adoption of the RUAA: “To establish evident partiality, the objecting party need only show that the arbitrator was *inclined* to favor one side, not that the arbitrator actually acted upon that inclination, such that the arbitrator’s decision was affected to the detriment of the other party.” *Prime Props., Inc. v. Leahy*, 228 P.3d 617, 621 (Or. Ct. App. 2010). Evident partiality as a basis to vacate an award does not apply to evident partiality by an arbitration organization. *FIA Card Servs.*, 200 P.3d at 1023. Evident partiality applies to “vacatur only for a neutral arbitrator . . . because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as neutral arbitrators.” RUAA § 23 cmt. 1.

186. A comparable provision in the Utah statute was described this way:

- the arbitrator exceeded the arbitrator's powers;<sup>187</sup>
- there was no agreement to arbitrate unless the person participated in the arbitration without raising an objection at the outset of the proceeding;<sup>188</sup> or
- the arbitration was conducted without proper notice of the initiation of the proceeding so as to prejudice substantially the rights of a party.<sup>189</sup>

If an award is vacated on any ground other than where there is no agreement to arbitrate, a court may order a rehearing.<sup>190</sup> If an award is vacated because the award is procured by "corruption, fraud or other undue means," or because of "corruption by an arbitrator," the rehearing must be held before a new arbitrator.<sup>191</sup> If an award is vacated on any other ground, the new hearing may be held before the arbitrator who made the award or

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[An] arbitrator's discovery decisions can provide grounds for vacatur if those decisions prevent a party from exercising statutorily-guaranteed rights to an extent that 'substantially prejudice[s]' the complaining party. At a minimum, a discovery decision must be sufficiently egregious that the [superior] court is able to identify specifically what the injustice is and how the injustice can be remedied.

Hicks v. UBS Fin. Servs., Inc., 226 P.3d 762, 771 (Utah Ct. App. 2010).

187. Where judicial review is sought on the ground that an arbitrator exceeded his power, it is presumed that the arbitrator decided only those issues submitted for arbitration. *Einhorn v. Valley Med. Specialists*, 838 P.2d 1332 (Ariz. Ct. App. 1992). "The boundaries of the arbitrators' powers are defined by the agreement of the parties." *Smitty's Super-Valu, Inc. v. Pasqualetti*, 525 P.2d 309, 311 (Ariz. Ct. App. 1974); *e.g.*, *Mosely v. Brewer*, 679 P.2d 563, 565 (Ariz. Ct. App. 1984); *Goldsberry*, 583 P.2d at 1364. There is no requirement that an arbitrator "makes findings or give reasons for his conclusion." *Safety Control, Inc. v. Verwin, Inc.*, 494 P.2d 740, 743 (Ariz. Ct. App. 1972). Nor will a court review whether an arbitrator correctly applied the law. *Hembree v. Broadway Realty & Trust Co.*, 728 P.2d 288, 294 (Ariz. Ct. App. 1986). An issue of arbitrability may be raised in an application to vacate an award on the grounds that the arbitrator exceeded his power where there was no agreement to arbitrate. *See Brake Masters Sys., Inc. v. Gabbay*, 78 P.3d 1081, 1084 (Ariz. Ct. App. 2003).

188. The purpose of this section is to "establish that if there is no valid arbitration agreement, then the award can be vacated; however, the right to challenge an award on this ground is conditioned upon the party who contests the validity of an arbitration agreement raising this objection no later than the beginning of the arbitration hearing." RUA § 23 cmt. 2. This basis for vacating an arbitration award should not be viewed as undoing the well-established doctrine that nonsignatories to arbitration agreements, may, under certain circumstances, be able to compel arbitration or may be compelled to arbitrate. *See Schoneberger v. Oelze*, 96 P.3d 1078, 1081 n.5 (Ariz. Ct. App. 2004) ("Under well-established common law principles, a nonsignatory may be entitled to enforce, or be bound by, an arbitration provision in a contract executed by others.").

189. This ground for vacating an arbitration award is not in the AZ-UAA.

190. ARIZ. REV. STAT. ANN. § 12-3023(C) (Westlaw through 2011 Legis. Sess.).

191. *Id.*

the arbitrator's successor.<sup>192</sup> Upon rehearing, an award must be entered within the same time as applicable to the initial award.<sup>193</sup>

An important related issue was the subject of a United States Supreme Court decision involving federal arbitration law. In *Hall Street Associates, LLC v. Mattel, Inc.*<sup>194</sup> the United States Supreme Court held that the grounds for judicial review of arbitration awards under the FAA were exclusive. The Supreme Court found unenforceable an arbitration agreement which provided that any arbitration award could be reviewed for errors of law or where there was a lack of substantial evidence to support any findings of fact. The decision in *Hall Street Associates* has called into question whether nonstatutory grounds for judicial review of arbitration awards remain possible under the FAA. The Ninth Circuit has held that the common law doctrine of manifest disregard of the law does remain viable as falling within the provision of the FAA that permits judicial review of an arbitration award when arbitrators have exceeded their powers.<sup>195</sup>

The Comments to the RUAA offer insight into the thinking of the Drafting Committee on this issue. The Drafting Committee specifically declined to include manifest disregard of the law as a basis for judicial review as well as another nonstatutory ground for judicial review—where an award violates public policy.<sup>196</sup> Although the AZ-RUAA does not expressly provide that these nonstatutory grounds may be used to vacate an arbitration award, according to the Drafting Committee, “[b]ecause these bases for vacating arbitral awards have traditionally been nonstatutory, courts may still use these standards in appropriate cases.”<sup>197</sup>

A matter of great debate among the Drafting Committee members concerned whether to expressly include in the RUAA a provision permitting

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192. *Id.*

193. *Id.*

194. 552 U.S. 576 (2008).

195. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277 (9th Cir. 2009). To be in manifest disregard of the law, it must be clear from the record that the arbitrator recognized the applicable law and ignored it. *Id.* at 1290.

196. RUAA § 23 cmt. C(5). Because the public policy ground for vacating an arbitration award existed in the District of Columbia before its adoption of the RUAA, the District of Columbia Court of Appeals held that the doctrine remains alive in the District. *A1 Team USA Holdings, LLC v. Bingham McCutchen LLP*, 998 A.2d 320, 327 (D.C. 2010). The District of Columbia's adoption of the RUAA includes a provision different than the RUAA. It provides that an award may be vacated “on other reasonable ground[s].” *Id.* The court in *A1 Team USA Holdings* held that this provision did not authorize “merits” review of an arbitration award. *Id.* at 326. The Nevada Supreme Court has held that its arbitration law permits judicial review based on nonstatutory grounds, such as manifest disregard of the law, or where an award is arbitrary, capricious or unsupported by the agreement. *Bohlmann v. Byron John Printz & Ash, Inc.*, 96 P.3d 1155, 1157 (Nev. 2004).

197. Heinsz, *supra* note 3, at 35.

a court to vacate an award on grounds the parties themselves negotiated, like the provisions which were the subject of the decision in *Hall Street Associates*.<sup>198</sup> Although specific language was omitted from the RUAA to enable this, the Drafters contemplated that such a so-called “opt-in” provision would be permissible where authorized under applicable law. The Comments provide:

This decision not to include in the RUAA a statutory sanction of expanded judicial review of the “opt-in” device effectively leaves the issue of the legal propriety of this means for securing review of awards to the developing case law under the FAA and state arbitration statutes. Consequently, parties remain free to agree to contractual provisions for judicial review of challenged awards, on whatever grounds and based on whatever standards they deem appropriate until the courts finally determine the propriety of such clauses.<sup>199</sup>

Although the Drafting Committee did not foreclose completely the availability of an opt-in provision, or whether the nonstatutory grounds of vacatur (e.g., manifest disregard of the law, violation of public policy) are available to review arbitration awards, these may be in doubt in light of prior Arizona cases holding that judicial review of arbitration awards is limited to statutory grounds.<sup>200</sup>

#### MODIFICATION OR CORRECTION OF AN AWARD

In a provision virtually identical to existing law, the AZ-RUAA permits a party to move a court to modify or correct an award within ninety days of receiving notice of the award or within ninety days of receiving notice of a

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198. RUAA § 23 cmt. B; *see* Heinsz, *supra* note 3, at 27–30.

No single issue consumed more of the Drafting Committee’s time and energies than the question of whether section 23 of the RUAA should incorporate a provision expressly permitting parties to contractually “opt-in” to either judicial or appellate arbitral review of arbitration awards for errors of law, fact, or any other grounds not prohibited by applicable law.

Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 84 (2001).

199. RUAA § 23 cmt. B(5). “As the Official Comments make clear, however, the decision not to include an opt-in section in the RUAA was not intended to prohibit parties from agreeing to such review where appropriate.” Heinsz, *supra* note 3, at 30.

200. *E.g.*, *Brake Masters Sys., Inc. v. Gabbay*, 78 P.3d 1081 (Ariz. Ct. App. 2003); *Creative Builders, Inc. v. Ave. Devs., Inc.*, 715 P.2d 308, 312 (Ariz. Ct. App. 1986); *Pawlicki v. Farmers Ins. Co.*, 618 P.2d 1096 (Ariz. Ct. App. 1980).

modified or corrected award.<sup>201</sup> A court must correct or modify an award where (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person or thing or property referred, (2) the arbitrator made an award on a claim not submitted and the award may be corrected without affecting the merits of the decision, or (3) the award is imperfect in a matter of form not affecting the merits of the decision. If a motion under this section is granted, the court “shall” modify or correct the award, and, unless a motion to vacate the award is pending, confirm the award as modified or corrected.<sup>202</sup> A motion to modify or correct an award may be joined with a motion to vacate the award.<sup>203</sup>

#### JUDGMENT ON AWARD

Upon granting an order vacating an award without directing a rehearing, confirming an award, or modifying or correcting an award, the court must enter a judgment accordingly.<sup>204</sup> In such a proceeding,<sup>205</sup> as well as in “subsequent judicial proceedings,”<sup>206</sup> a court may allow “reasonable costs.” Furthermore, in the event of a contested proceeding, the court may confirm an award, vacate an award, modify or correct an award, or award the prevailing party reasonable attorneys’ fees and other reasonable expenses where an award is vacated, without a rehearing or modification or correction.<sup>207</sup> The purpose of this section is to promote the “statutory policy

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201. Compare ARIZ. REV. STAT. ANN. § 12-3024 (Westlaw through 2011 Legis. Sess.), with *id.* § 12-1513.

202. *Id.* § 12-3024(B). A North Carolina appellate court held that this section does not permit a trial court to modify an award to include prejudgment interest if not provided for in the arbitration award. *Blanton v. Isenhower*, 674 S.E.2d 694 (N.C. Ct. App. 2009).

203. ARIZ. REV. STAT. ANN. § 12-3024(C).

204. *Id.* § 12-3025(A).

205. *Id.* A similar provision exists under the AZ-UAA. *Id.* § 12-1514.

206. *Id.* § 12-3025(B).

207. *Id.* § 12-3025(C). The right to recover attorneys’ fees in connection with proceedings in which an award is challenged was included in the RUAA by the Drafting Committee to discourage “unwarranted assaults on arbitral determinations.” Heinsz, *supra* note 3, at 36.

[The Drafting Committee] meant for a court to use its discretion . . . to take into account equitable considerations. Where the appropriateness of an arbitrator’s decision is a close question or the public interest is enhanced by making the law clearer in the area of vacatur, a court should not hesitate to withhold attorney’s fees and other costs if that would better serve the interests of justice.

*Id.* at 37. “The right to recover post-award litigation expenses does not apply if a party’s resistance to the award is entirely passive . . . .” RUAA § 25 cmt. 4. Interpreting the similar provision in the Hawaii statute, its intermediate appellate court held that the right to recover attorneys’ fees applied to proceedings covered in section 12-3025(C) and not proceedings

of finality of arbitration awards,” because the “[p]otential liability for the opposing parties’ post-award litigation expenditures will tend to discourage all but the most meritorious challenges of arbitration awards.”<sup>208</sup>

#### JURISDICTION

Regardless of whether parties have agreed to conduct their arbitration in Arizona, any Arizona court having jurisdiction over the dispute and the parties may enforce an agreement to arbitrate.<sup>209</sup> On the other hand, where the parties’ arbitration agreement provides that the arbitration is to occur in Arizona, then an Arizona court has exclusive jurisdiction to enter judgment on an award.<sup>210</sup> In other words, the location of arbitration determines if a court has jurisdiction to confirm an arbitration award.<sup>211</sup> The purpose of this latter provision is to “prevent forum-shopping in confirmation proceedings and to allow party autonomy in the choice of location of the arbitration and its subsequent confirmation proceedings.”<sup>212</sup>

#### VENUE

Motions made under the AZ-RUAA must be made in the court of the county where the agreement to arbitrate specifies the arbitration is to be held or where the hearing actually has been held.<sup>213</sup> If a location is not specified in the arbitration agreement or if the arbitration has not been held, venue is proper in the superior court of any Arizona county in which an adverse party resides or has a place of business. If the adverse party does

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incurred in a judicial proceeding to enforce a judgment. *United Pub. Workers Local 646 v. City & Cnty. of Honolulu*, 194 P.3d 1163, 1170 (Haw. Ct. App. 2008).

208. RUAA § 25 cmt. 3.

209. ARIZ. REV. STAT. ANN. § 12-3026(A). “This provision intends to prevent a party, particularly one with superior bargaining power, from requiring the other party to determine the enforceability of an arbitration agreement only in a distant forum.” Heinsz, *supra* note 3, at 51. Any state with jurisdiction over the dispute and the parties may enforce an agreement to arbitrate. RUAA § 26 cmt. 2. Where there is an independent basis of federal court jurisdiction, a federal court may enforce an agreement to arbitrate. *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 918–19 (9th Cir. 2009).

210. ARIZ. REV. STAT. ANN. § 12-3026(B).

211. Even though this section uses the word “judgment,” it is intended to apply to the confirmation of an award. RUAA § 26 cmt. 3.

212. *Id.*

213. ARIZ. REV. STAT. ANN. § 12-3027. The venue provision is intended to give “priority to the county in which the arbitration hearing was held.” RUAA § 27 cmt. 1. Under the AZ-UAA “venue of the appropriate superior court shall be determined as in any other civil action.” ARIZ. REV. STAT. ANN. § 12-1516.

not reside in Arizona or does not have a place of business in Arizona, venue is proper in any county.<sup>214</sup> Unless a court directs otherwise, all subsequent motions must be made in the court hearing the initial motion.

#### APPEALS FROM ARBITRATION AWARDS

Although there are special statutes applicable to the appeal from arbitration awards, appeals shall be taken in the “manner and to the same extent” as from orders and judgments in civil cases.<sup>215</sup> Only the numbering of several provisions in the AZ-UAA was changed by the AZ-RUAA. Under the AZ-RUAA appeals may be taken from the following arbitration awards:

- an order denying an application to compel arbitration;<sup>216</sup>
- an order granting an application to stay arbitration;<sup>217</sup>
- an order denying confirmation of an award;<sup>218</sup>
- an order modifying or correcting an award;<sup>219</sup>

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214. ARIZ. REV. STAT. ANN. § 12-3027.

215. *Id.* § 12-2101.01(B). The Arizona Rules of Civil Appellate Procedure are thereafter applicable to appeals from arbitration awards. Susan M. Freeman & Paul G. Ulrich, *Civil Appeals*, in ARIZONA APPELLATE HANDBOOK § 3.2.1.1.5 (3d ed. Supp. 1996).

216. ARIZ. REV. STAT. ANN. § 12-2101.01(A)(1); *Rocz v. Drexel Burnham Lambert, Inc.*, 743 P.2d 971, 973 (Ariz. Ct. App. 1987) (the “[d]enial of a motion to compel arbitration is substantively appealable”). In *Dusold v. Porta-John Corp.*, 807 P.2d 526 (Ariz. Ct. App. 1990), the Arizona Court of Appeals held that a judgment containing Rule 54(b) language dismissing all claims against a party and compelling arbitration was a final, appealable judgment under section 12-2101(B). The court distinguished its decision from *Roeder v. Huish*, 467 P.2d 902 (Ariz. 1970), where the Arizona Supreme Court held that an order compelling arbitration was not an appealable order and issues such as arbitrability and waiver of the right to arbitrate may be raised at the time an award is confirmed. *See Ruesga v. Kindred Nursing Ctrs. W., LLC*, 161 P.3d 1253, 1259 (Ariz. Ct. App. 2007) (trial court order compelling arbitration but neither dismissing any claims nor including Rule 54(b) language is not appealable).

217. ARIZ. REV. STAT. ANN. § 12-2101.01(A)(2).

218. *Id.* § 12-2101.01(A)(3). Unlike provisions (A)(1) and (A)(2) above, this section does not distinguish between the AZ-UAA and the AZ-RUAA. Nevertheless, it would presumably apply to orders denying confirmation under sections 12-1512 and 12-3025. Because the AZ-RUAA permits a court to deny confirmation of an award, vacate the award and direct a hearing, *id.* § 12-3023(C), a question arises whether such orders are appealable. The Supreme Court of Nevada has held that because such orders do not “bring an element of finality to the arbitration process,” they are not appealable. *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 204 P.3d 1262, 1266 (Nev. 2009).

219. ARIZ. REV. STAT. ANN. § 12-2101.01(A)(4). Unlike provisions (A)(1) and (A)(2) above, this section does not distinguish between the AZ-UAA and the AZ-RUAA. Nevertheless, it would presumably apply to orders modifying or correcting an award under sections 12-1513 and 12-3024.

- an order vacating an award without directing a rehearing;<sup>220</sup> or
- any judgment or decree.<sup>221</sup>

Although no explicit statutory basis exists to appeal an order compelling arbitration, the Arizona Supreme Court has authorized a procedure to obtain appellate review of such orders in certain circumstances. In *Southern California Edison Co. v. Peabody Western Coal Co.*,<sup>222</sup> the court held that in complex cases where a genuine dispute exists over arbitrability, the party contesting arbitrability should request that the trial court issue a Rule 54(b) judgment, thus permitting an immediate appeal. If the trial court refuses to do so, the party should file a Special Action in the Arizona Court of Appeals where the standard of review of the trial court's determination should be an abuse of discretion.

#### CONCLUSION

The law of arbitration has changed dramatically since the promulgation of the UAA in 1955 and its adoption in Arizona in 1962. The promulgation of the RUAA in 2000 and its subsequent adoption by the Arizona Legislature in 2010 brings Arizona's arbitration laws current with the expanded use of arbitration in Arizona by addressing the many issues that arise in arbitration disputes. As arbitration law continues to become more uniform throughout the country, lawyers, and their clients, will benefit knowing that arbitration procedures will be the same, or similar, wherever, and whenever, a dispute subject to arbitration arises.

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220. *Id.* § 12-2101.01(A)(5). Unlike provisions (A)(1) and (A)(2) above, this section does not distinguish between the AZ-UAA and the AZ-RUAA. Nevertheless, it would presumably apply to orders vacating an award without a rehearing under sections 12-1512 and 12-3025.

221. *Id.* § 12-2101.01(6).

222. 977 P.2d 769, 776 (Ariz. 1999).